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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. A-747

ALFRED KIRSHNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA, SECRETARY OF THE TREASURY, COMMISSIONER OF I.R.S., ALVIN D. LURIE, in his capacity as Assistant Commissioner Employer Plans and Exempt Organizations, I.R.S., BERNARD GOLDBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, HARRISON GOLDIN, JAMES REGAN, Individually as Trustees of the Teachers Retirement System of the City of New York and ISAIAH ROBINSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALFRED KIRSHNER, *Pro Se*
98 Van Cortlandt Park South
Bronx, New York 10463

March 12, 1979

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Alfred Kirshner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 30, 1978.

Opinions Below

The opinion of the Court of Appeals as yet unreported appears in Appendix A. The opinion of the District Court for the Southern District of New York is not reported and appears in Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 30, 1978. By order of Mr. Justice Marshall, dated February 26, 1979, petitioner's time to file this petition was extended to April 28, 1979.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

Questions Presented

1. Whether the Court below properly held that the plaintiff, a member of a contributory pension fund, lacks standing to sue defendants "but for" whose actions he would not have suffered losses which made it improbable that he will receive his pension for life.

2. Can the classification by Congress in PL 94-236, exclude just five City employee contributory pension plans out of thousands, from the long relied on protection of 26 USC 401/503 without violating the Due Process and Unequal Protection clauses of the Fifth Amendment of the U.S. Constitution?

3. Whether the plaintiff has standing under 5 USC 702 to challenge whether the Internal Revenue Service (hereinafter known as IRS) could consistent with its responsibility to administer the law, accept without investigation the assumption that the Teachers Retirement System (hereinafter known as TRS) trustees were not violating

26 USC 401 by purchasing New York City (hereinafter known as NYC) bonds after the wide publicity in all media that the City was on the verge of bankruptcy.

Statute Involved

The case involves the constitutionality of PL 94-236 which is set forth in Appendix C, infra p. 26a.

Statement of the Case

This is a pro se case in which *Kirshner* is suing in his own interest, and as stockholder in a derivative suit to protect the assets of the contributory Teachers Retirement System.

The 2nd Circuit Court found that I had standing to sue the TRS Trustees for violation of the Federal Security Laws 10b, 10b5, and 17a.

This application for a writ involves only the part of my case against the federal defendants and the issue of the constitutionality of PL 94-236.

In November 1975 NYC's credit standing had reached a new low. No bank, no investor in the country would advance it a dime. Standard and Poor's had removed its bond rating entirely. Moody's lowered its rating to Caa. This made their purchase illegal for all pension funds and National, State and FDIC banks. The City decided to use its employee contributory pension funds assets to bail itself out.

This was accomplished by threatening employee layoffs, payless paydays and bankruptcy unless the NYC employees pension fund trustees agreed to buy two and a half billion dollars worth of NYC bonds.

TRS trustees were fully aware that buying speculative employer bonds was illegal under 26 USC 401a/503b.

Therefore they insisted that the purchases be first approved by the IRS or Congress.

An "Agreement" was signed in which the five NYC employee pension funds agreed to buy two and a half billion dollars worth of NYC bonds.[1] Its Paragraph 7(e) (vi) conditioned the purchase on IRS approval or a Congressional act suspending the prohibited transaction law.

IRS Asst. Commissioner Lurie issued letters on December 5 and 13, 1975, permitting the first purchases of NYC bonds after receiving a letter from TRS trustees asking him to assume that the purchase did not violate the investment requisites of RR 69-494 of 401a. It is this approval by the IRS that I am appealing under 5 USC 702.

Then no further NYC bond purchases were made until PL 94-236 was passed on March 19, 1976. PL 94-236 suspended protective laws 26 USC 401a and 503b for just five of the 600,000 Federally registered pension funds and provided no substitute for them.

Sound, highly rated corporate TRS assets were sold at a loss of $204 million from December 1, 1975 to October 1, 1978 to obtain cash to buy Caa rated, unmarketable, unamortizable NYC bonds at rigged, above market price. "But for" PL 94-236 this would not have been done.

Because of additional losses detailed under "Standing" it is improbable that there are sufficient funds left to pay my pension for life.

I am challenging the constitutionality of PL 94-236 because it deprived me as plaintiff and other contributory TRS pensioners of property without Due Process and of

[1] The "Agreement" was signed November 26, 1975 by the five NYC employee pension funds, the NYC Clearing House Banks, NYC, and the Municipal Assistance Corporation (hereinafter known as MAC). MAC is a state entity which issues moral obligation bonds for NYC.

equal protection of the law in violation of the Fifth Amendment of the United States Constitution.

The time limit of PL 94-236 was extended by PL 95-497 from 1978 to 1982. The purchase by TRS of $205 million of additional uninsured MAC bonds has been authorized. The wasting of the plaintiff's and pensioners assets in the TRS continues.

The issues in this case transcend in importance the serious injuries bourne by the plaintiff. Affected equally are the life savings, ". . . investment for the future"[2] of more than ten million similarly situated local and state employee members of contributory pension plans.

This is a novel case because PL 94-236 is unprecedented. This case involves complex questions of law relating to contributory pension funds never ruled on by the Supreme Court.[3]

[2] *Teamsters* v. *Daniel*, S. Ct. #77-753 January 16, 1979. 46 LW 3512.

[3] Nature of Pension Systems: There are two basic kinds of pension systems; the fully funded and the pay-as-you-go types.

The fully funded type is solvent. It has sufficient capital investments to pay all its retired members their actuarily determined pensions for life.

The pay-as-you-go plan has insufficient assets to meet the liabilities for benefits earned by its members. It is often insolvent because the employer lags in paying his contribution. When such an employer goes bankrupt his IOU's in the employee pension fund have no value and it goes bankrupt too.

600,000 public and private pension plans are covered by 26 USC 401 which establishes prudent man rules. Private plans are also covered by ERISA. State and local public employee plans are not covered by ERISA. They are covered only by 26 USC 401/503 the exclusive benefit and prohibited transaction rule laws. The IRS is the regulatory control agency for 26 USC 401/503.

A contributory pension plan is one in which employees contribute regularly by deductions from their wages to their pension funds. These are separate from those made by the employer. Employees pay taxes on the earnings which they make as contri-

REASONS FOR GRANTING THE WRIT

I

The Decision Below on Standing Is Not Consistent With the Decision of This Court in *Duke Power*.

The decision of the 2nd Circuit Court denying standing is not consistent with the decision of this Court in *Duke Power* v. *Carolina Environmental Study Group*, 46 L.W. 4845 (1978).

Standing requires: ". . . a 'distinct and palpable injury' to the plaintiff . . ." and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct . . ." *Duke, supra* 4848.

A. *Injury.*

The denial of discovery or a hearing prevents me from proving these facts: "But for" PL 94-236 the following concrete, immediate injuries would not have been sustained:

(1) The decline from June 30, 1974 to June 30, 1977 of $51 million in the value of the assets of the contributory TRS Annuity Reserve Fund which consists exclusively of plaintiff's and pensioners' savings ". . . investment for the future." [4]

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butions. Employee contributions are a savings, ". . . investment for the future."

The Pension Task Force Report on Public Employee Retirement Systems, Committee on Education and Labor, House of Representatives, March 15, 1978, states:

> ". . . The total assets of public employee pension funds was $108 billion in 1975." p. 48
>
> ". . . plans covering 85% of all state and local government employees derive approximately 40% of their total contribution income from mandatory employee contributions. . . ." p. 135
>
> TRS has been a contributory plan since 1917.

[4] TRS Annual Report FY 1973-74, p. 28; TRS Annual Report FY 1976-77, p. 32.

Since TRS pensions are paid not only from investment income but also from the return of the contributions made by each pensioner in actuarily calculated installments, diminishing this source of benefits seriously injures pensioners. It destroys full-funding and makes certain that the plaintiff will not get back his savings.[5]

(2) The loss of $204 million by the TRS fixed funds through the premature sale of A, AA, AAA corporate bonds to obtain cash to buy NYC and MAC bonds.[6]

(3) The loss of $150 million through the purchase of NYC bonds at par, rigged at 20% above market price.[7]

---

[5] Nature of TRS: While TRS members are actively teaching, NYC makes monthly payments to each individual account in the Contingent Reserve Fund, as deferred wages. In addition the 80,000 employed teachers contribute monthly to the Annuity Savings Fund. This is personal savings taken out of his salary.

When a TRS member retires the amount credited to his account in the Contingency Reserve Fund plus the amount the City owes it is transferred to the Pension Reserve Fund No. 1 and the amount credited to his Annuity Savings Fund is transferred to the Annuity Reserve Fund. Thus the 25,000 TRS pensioners' trusts are fully-funded.

The TRS Contingent Reserve Fund is a pay-as-you-go fund. NYC owes it in accrued unfunded liability approximately $2.9 billion.

Prior to 1970 approximately 35% of the contributions to TRS came from employees. Since 1970 when the United Federation of Teachers became the bargaining agent, active teacher contributions have been reduced so that they are now approximately eight percent of TRS receipts. Most TRS pensioners retired before the first Union contract with the City was signed.

Consequently the per capita contributory savings investment of TRS pensioners is much greater than that of active teachers. They are disproportionately injured by TRS losses and put at greater risk by NYC bond purchases.

TRS pensioners cannot withdraw any part of their contributions to the TRS Annuity Reserve Fund.

[6] "Summarization of Long Term Investments Sold by the Comptroller as Custodian of the Funds of the Teachers Retirement System . . ." from December 1975 through September 1978.

[7] The price was rigged by selling the entire issue to the five NYC pension systems to circumvent a free market determination of a fair price.

(4) The loss of $188 million in interest over 14 years resulting from the exchange of 11% MAC bonds for 6% MAC bonds which was not required of all other equal creditors.[8]

(5) The freezing of 46% of TRS fixed assets including the Annuity Reserve Fund in unamortizable NYC and moral obligation MAC bonds.[9] This erodes quality and destroys liquidity and diversity, essential to meet investment security standards.[10]

(6) The purchase of $860 million NYC unmarketable bonds of undetermined value, rated Caa by Moody which prohibited their purchase by all other federally registered pension funds and all National, State and FDIC banks in the USA.[11]

TRS Assets "Belong" to TRS Members.

(a) Plaintiff and TRS contributory pensioners have vested rights in TRS assets.[12] N.Y. State recognizes vested pension rights as assets when computing asset value in divorce cases.

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[8] "Agreement" paragraph 6(a) and (b).

[9] "Agreement" paragraph 7(c).

[10] "Limitations on the purchase of employer securities . . . have long been recognized on the grounds that collaterizing a promise with the promisor's evidence of debt or share in its equity is no security at all." Roger Murray. Economic Aspects of Pensions, p. 127.

[11] 12 USC 24 and the October 8, 1975 Hearing before the Subcommittee of the Committee on Government Operations of the House of Representatives studying the "Adequacy of Federal Agency Studies Into the National Impact of a New York Default." pp. 12, 13, 14.

[12] McGill, PRESERVATION OF PENSION BENEFIT RIGHTS, Pension Research Council, 1972, p. 46.
Greenough and King, PENSION PLANS AND PUBLIC POLICY, Columbia University Press, 1976, p. 67.

(b) Article V, Section 7 of the N.Y. State Constitution provides that membership in a civil service pension system in the state ". . . shall be a contractual relationship, the benefits of which shall not be diminished or impaired." Chief Judge Charles Breitel of the State Court of Appeals held that "benefits" implied the source of benefits as well. The source of TRS benefits is the assets of TRS. They have been significantly diminished and impaired by PL 94-236. The injuries are real. They are not borne by TRS trustees. They are borne by the plaintiff and TRS pensioners.

(c) The conclusion to the Pension Task Force Report on Public Employee Retirement Systems of the Committee on Education and Labor, of the House of Representatives, Ninety-fifth Congress, March 15, 1978, states:

> ". . . government plan fiduciaries . . . should be required to act prudently and for the exclusive purpose of providing benefits to plan participants and beneficiaries, in accordance with the principle that pension benefits have been earned by plan participants and that the associated plan assets therefore 'belong' exclusively to them rather than to the sponsoring government." p. 198.

Since TRS assets "belong" to all TRS members, the injuries and losses listed above reduced the net value of each participants interest in TRS assets. The significant decline in the net value of *Kirshner's* interest meets his injury requirement. The significant decline in the value of TRS fixed assets due to PL 94-236 make it improbable that he will receive his pension for his actuarily expectant lifetime.

B. *Causal Connection.*

These injuries ". . . fairly can be traced to the challenged action of the defendant."

"But for" PL 94-236 the prohibited transactions described above would not have taken place. This is proven by examining the language of the PL 94-236 authorized "Agreement", paragraph 7(e) (vi):

> "7(e) The obligations of the Pension Funds to purchase bonds . . . shall be conditioned upon each of the following facts being true on the date of each such purchase:
>
> (vi) the Internal Revenue Service shall have ruled or the Congress of the United States shall have provided, that such purchases of obligations by the Pension Funds pursuant to this Agreement shall not constitute prohibited transactions or otherwise adversely affect the qualified status of the Pension Funds for the purpose of the Internal Revenue Code of 1954, as amended."

The "Agreement" was signed November 26, 1975. It called for monthly purchases of NYC bonds by TRS but none were bought until IRS Assistant Commissioner Lurie's December 5 and 13, 1975 letters were received. Then a hiatus until after March 19, 1979 when PL 94-236 was signed into law. The connection between PL 94-236 and the NYC bond purchases by TRS is clearly established. The injuries described above would not have been inflicted "but for" PL 94-236.

C. *Redress.*

The exercise of the Court's remedial powers could redress the claimed injuries by restoring the assets "whole" as in *Marshall* v. *Penn* No. 77-1169, 10th Circuit 11-21-78, N.Y. Law Journal 1-8-79.

If PL 94-236 is unconstitutional then the 1975 TRS trustees purchases of MAC and NYC bonds would be violative of 26 USC 401a/503b and the IRS approval subject to judicial review and redress under 5 USC 702/706.[13]

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[13] PENSION FUND INVESTMENT POLICY*

Preservation of capital under a fiduciary relationship between trustees and pensioner/investors under the 146 year old prudent man rule governs pension funds management policy. This has been spelled out for trustees of tax exempt pension funds by

A. 26 USC 401 and its RR 69-494 which establish the exclusive benefit of employees requirements for investments:
   1. Cost must not exceed fair market value at time of purchase.
   2. Fair return.
   3. Liquidity.
   4. Diversity and prudence.

B. 26 USC 503 b defines "prohibited transactions" and includes those which
   1. Lend any part of its corpus to the employer without the receipt of "adequate security". Defined below.
   2. Makes substantial purchase of securities for more than adequate consideration from employer.
   3. Engage in any other transaction which results in a substantial diversion of corpus to employer.

"503c1(b)(1) . . . defines 'adequate security' as something in addition to and supporting a promise to pay, which is pledged to the organization . . . that it may be sold, . . . in default of repayment of the loan, the value and liquidity of which security is such that it may reasonably be anticipated that loss of principal or interest will not result from the loan." RR70-131: says pledged employers general assets is not adequate security.

C. Management of quality of investments is determined by the same standards as those established for banks. In fact, TRS is limited by law to those investments which are legal for purchase by N.Y. State savings banks. Moody's and Standard & Poor's ratings are used as standards by the U.S. Comptroller of Currency under 12 USC 24 and 12 C.F.R. 1.3(b).

D. SEC Statistical Bulletin reported that as of Dec. 31, 1974 the 6000 public employee pension funds had assets of

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* Cohen, J.B. Investment Analysis and Portfolio Management; R. Murray. Economic Aspects of Pensions.

TRS is threatened with a potential disaster, NYC's bankruptcy. A crisis situation exists. This warrants judicial notice now. If it becomes a fact it will be too late to redress the injuries within the limited life span of TRS pensioners.

D. *Private Attorneys General.*

TRS trustees and the IRS have failed to carry out their fiduciary duties. Therefore there is no one left to protect TRS assets as well as his own interests except a TRS member such as Kirshner acting as Private Attorneys General, as he is in this case.

II

The Decision Below on Due Process Is Not Consistent With the Decisions of This Court.

The 2nd Circuit Court dismissed the plaintiff's due process claim by stating: ". . . the challenged actions . . . are rationally related to lawful governmental objectives and are not unreasonable, arbitrary or capricious." (p. 11a, App. A).

A. *Allied Structural Steel*, 40 L.W. 4887 (1978) and *Turner Elkhorn Mining*.

Due Process,

> [1] ". . . Rationality must be determined by a comparison of the problem to be remedied with the nature

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$93.3 billion. Of that total only 9/10 of 1% was invested in State and local securities.

E. Sound pension fund investment policy dictates that corporate funds of high quality be held to maturity for full return. To sell them at a discount before maturity when they are producing adequate interest to meet actuarial requirements is a waste of assets.

F. Since municipal bonds are tax free, corporates are a better investment for tax exempt pension funds because the yield is higher for equivalent Moody rating.

> and scope of the burden imposed to remedy that problem.
>
> [2] In evaluating the nature and scope of the burden it is appropriate to consider the reliance interests of the parties affected, *Allied* 4890-1, . . . ; whether the impairment of the private interest is effected in an area previously subjected to regulatory control, *Allied* at 4891, . . . ; [3] the equities of imposing the legislative burdens, . . . *Turner Elkhorn Mining,* 428 US 19, [4] and the inclusion of statutory provisions desired to limit and moderate the impact of the burdens, . . . *Allied* 4891. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, [5] they must only be used to determine whether the legislation represents a rational means to a legitimate end. *Turner Elkhorn* supra 18." *Nachman* v. *PBGC,* 7th Circuit Court of Appeals #44-2146 p. D-22 (BPR) 1-29-79.

Applying the above to PL 94-236:

[1] PL 94-236 impaired retirement security by arbitrarily placing the entire burden of supporting NYC's fiscal integrity on the five NYC employee pension funds.

[2] The five funds had relied since 1938 on 26 USC 401 and 503 which placed all their investments under the prudent man rule and the regulatory control of the IRS.

[3] Equity is strained when the employer as here makes a claim on earned wages and the savings of employees in fully-funded pension assets years after serverance. Savings entrusted to a federally registered pension plan deserve equal protection to those entrusted to an FDIC bank.

[4] PL 94-236 puts no limitations on time; the non-amortizable NYC bonds are dated up to 1990.

[5] PL 94-236 provided benefits for society as a whole at the expense of the plaintiff and TRS pensioners. This is not a rational means to a legitimate end.

B. *Duke Power.*

The due process reasonableness of PL 94-236 is challenged on two counts based on *Duke Power* 46 LW 4849-50.

(1) No expert appraisal was made of the disproportionate impact and risk to TRS pensioners from the PL 94-236 waiver of 26 USC 401a/503b. The only detailed appraisal made before the House Ways and Means Committee and quoted by federal defendants was the testimony of ". . . Jack Bigel, pension consultant to the Municipal Labor Committee concerning the impact of the then proposed legislation. . . ." [14] He testified on February 23, 1976.

No mention was made of the fact that Mr. Bigel received from NYC in (a) pension consultant fees, $296,575 from 1/1/74 through 6/30/75, and (b) more than $900,000 of NYC funds in 1978, a conflict of interest situation which clouds the value of his testimony.[15]

An unbiased expert appraisal would have revealed the foreseeable situation as it is now:

(a) The five NYC employee pension systems hold $3.5 billion of NYC/MAC bond debt.[16] (This includes 46% of TRS fixed assets.)[17] It constitutes 28% of the total of $12.5 billion of NYC's bonded debt.[18]

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[14] Hearings on H.R. 11700. NYC Pension Fund Legislation, House Ways and Means Committee, Feb. 23, 1976, pp. 28 through 35.

[15] (a) N.Y. State Insurance Department, June 30, 1975 Annual Report of NYC Employees Retirement System, p. 19. (b) Wall Street Journal, March 7, 1979, p. 20.

[16] NYC Office of the Comptroller, Division of Investment Accounting. "Summary Schedule of Holdings by Retirement System . . . August 31, 1978."

[17] "TRS Summary of Investments Portfolio of Fixed Annuity Program as of September 30, 1978."

[18] "NYC Comptroller's Report. January 1979. No. 7," p. 2.

(b) NYC's liability to the five pension systems as unfunded accrued liability is $10.3 billion.[19] This brings the total liability of NYC to the five systems to $13.8 billion. This is 60.8% of the $22.8 billion of NYC's total liability.

No quid pro quo was provided for the unreasonable share of involuntary investment risk which resulted from the arbitrary, discriminatory classification of PL 94-236.

(2) (a) PL 94-236 provided no substitute, insurance or assurance to replace the long relied on protection of 26 USC 401a/503b, which it removed.

(b) Removal of 26 USC 401a/503b restraints impaired the TRS trustees independent exercise of investment discretion and removed their incentive for responsible judgment. The huge losses listed above were produced by their ensuing irresponsibility. "But for" PL 94-236 this would not have happened.

(c) In *Duke Power* supra 4547 the due process requirement was met in part by 42 USC (Supp V) section 2210(e) because it provided a statutory commitment by Congress to ". . . take whatever action is deemed necessary and appropriate to protect the public from the consequences of any such disaster." No such provision was made in PL 94-236 in the event of NYC bankruptcy.

PL 94-236 violates the due process clause of the Fifth Amendment and is unconstitutional.

PL 94-236 has not advanced the legitimate purposes claimed for it. NYC is still threatened with bankruptcy with no market for its bonds.

C. *Mullane.*

No pensioner or pensioner organization was notified of, nor was permitted to testify at, the only Hearing held by

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[19] "Preliminary Official Statement, January 17, 1979" Offer of NYC $100 million G.O. Revenue Anticipation Notes. Due June 29, 1979.

Congress on PL 94-236.[14] It has been held that within limits of practicality notice must be such as is reasonably calculated to reach interested parties to afford them due process of law. *Mullane* v. *Central Hanover Bank,* 70 S. Ct. 652 (1950).

D. *Schlesinger* v. *Ballard.*

The Second Circuit Court erred in its decision when it stated:

> "Kirshner's claim that Public Law 94-236 and the IRS rulings violate the fifth and fourteenth amendments is likewise without merit. Their effect is solely to remove any question as to the tax exempt status of the securities involved and could only benefit, rather than damage, the City and its creditors. The district court was correct in dismissing appellant's constitutional claims. . . ." (p. 12a, App. A)

There is no question but that the City and its creditors could only benefit from PL 94-236. The question is, in so doing does PL 94-236 cause the plaintiff and TRS contributory pensioners severe damage in violation of due process?

While benefiting the City, PL 94-236 legalizes the breaking of the long relied on protective laws, 26 USC 401/503, in exchange for providing tax exemption for the purchase of already tax exempt NYC bonds. To put the losses and risks involved in the purchase of $2½ billion of unsecured bonds of the insolvent City only on the equal creditor City employee pension funds is unreasonable and violative of due process.

> "5TH AMENDMENT restrains such discrimination legislated by Congress as amounts to a denial of due process by unjust discrimination between persons of similar circumstances material to their rights." *Schlesinger* v. *Ballard,* 95 S. Ct. 572 (1975).

III

The Decision Below on Equal Protection Is Not Consistent With the Applicable Decisions of This Court.

The 2nd Circuit Court dismissed the plaintiff's equal protection claim by stating: ". . . he has not demonstrated any arbitrary or unreasonable classification in the statutes. . . ." (p. 12a, App. A)

Plaintiff's arguments on unreasonable classification are based on the following standards:

A. Rational Relations Standard.

B. Strict Scrutiny Standard:

1. Fundamental Rights.
2. Suspect Class.
3. Purposeful Unequal Protection.

A. *Equal Protection Based on the Rational Relation Standard.*

The PL 94-236 classification of just five of the 600,000 federally registered pension plans to be deprived of the long relied on protection of 26 USC 401 is arbitrary and in violation of the equal protection clause. It singles out and treats differently from all other millions of similarly situated contributory pension plan members the fully-funded retired employees of NYC. This minority is burdened with maintaining the fiscal integrity of its former employer. This creates an irrational, never-ending, modern bondsman employee-employer relationship which arbitrarily denies independence, security, and liberty to TRS pensioners.

In equal protection cases the Supreme Court need not accept at face value assertions of legislative purpose where an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have

been the goal of the legislation. *Weinberger* v. *Wiesenfeld*, 95 S.Ct. 1225 (1975).

The stated purpose of PL 94-236 is to preserve the tax exemption status of the five City employee pension plans despite their purchase of $2.5 billion of NYC bonds. To check the reasonableness of the classification made to achieve this end it is necessary to examine the language of PL 94-236. (p. 26a, App C)

PL 94-236 states:

> ". . . That (a) any pension plan . . . which . . . was a party in the . . . agreement of November 26, 1975 . . . shall not be considered to fail to satisfy the requirements of section 401(a) . . . and section 503(b) . . . merely because such plan . . . does any . . . of the following. . . ."
>
> . . . "(2) after August 20, 1975 . . . considers for purposes of determining investments will—
>
> (A) maintain the ability of the city of New York—
>
> (i) to make future contributions to the plan or trust, and
>
> (ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan or trust, and
>
> (B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust; . . . ."

Regarding 2(A)(i) above: Only the separate active teacher TRS trusts are dependant on annual city contributions. The City makes no contributions to retirees TRS trusts after their retirement. It is not rational to take $860 million from pensioners sound assets and exchange them for high-risk NYC bonds. It is not fair or rational to destroy their full-funding to make possible the

City's $860 million contribution to the 8% funded assets of the active teacher TRS pay-as-you-go trusts.

PL 94-236 while ostensibly neutral in its classification, in reality is discriminatory at the expense of the retirees of the five pension funds including the plaintiff and TRS pensioners.

Regarding 2(A)(ii) above: NYC is obliged to pay benefits for pensioners only if TRS goes bankrupt. TRS assets if restored whole are adequate even if the City goes bankrupt. If NYC goes bankrupt and brings down TRS with it, NYC will not be able to pay benefits within the limited lifetime of most TRS pensioners because TRS has 46% of its fixed assets in NYC/MAC bonds plus $10.3 billion in unfunded liability. Clearly this investment can only benefit NYC and only harm TRS pensioners.

Regarding 2(B) above: PL 94-236 destroys rather than protects ". . . the sources of funds to provide retirement benefits . . ." by legalizing gambling by TRS trustees with the life-savings, "investment for the future" of the plaintiff and TRS pensioners in high-risk NYC and moral obligation MAC bonds. TRS pensioners' full-funding was destroyed, not protected by PL 94-236 by the loss of $204 million in the sale of its sound corporate assets.

". . . The asserted purpose could not have been the goal . . ." The real goal, reached by circumvention was to bail out the insolvent employer by the illegal use of previous employees' pension assets.

> ". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *U.S. Trust* v. *N.J.*, 421 U.S. 26 (1977).
>
> ". . . Discrimination of an unusual character especially suggests careful consideration to determine whether . . . [it is] obnoxious to the constitutional provision. . . ." *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32 (1928).

B. *Equal Protection Based on the Strict Scrutiny Standard.*

The decision of the 2nd Circuit Court of Appeals in *Kirshner* is in conflict with the applicable decisions of the Supreme Court in regard to Fundamental Rights.

1. Fundamental Rights.

In *Examining Board* v. *Flores de Otero,* 426 U.S. 604 (1975), ". . . the right to work for a living" is considered ". . . the essence of personal freedom . . ." and its denial a constitutional violation. Benefits from a fully funded pension fund constitute earned wages provided for a "living" later in life. PL 94-236 denies this fundamental right by its discriminatory provisions excluding the protection of 26 USC 401/503 only for five NYC employee pension funds. This threatens the solvency of the investment source of these wages. It denied equal protection afforded all other pensioners similarly situated.

The right to survival after one's working years is a fundamental right. Survival for TRS pensioners depends on their pensions.[20] 8,000 are aged 75 to 100 and receive less than $4,000 a year. This right to survival outweighs the state's goal of protecting the fiscal integrity of NYC.

A pension benefit is a right which employees earn and on which they "are entitled to rely . . ." *Allied Structural Steel* v. *Stannaus,* 46 L.W. 4888 (1978).

PL 94-236 by removing 26 USC 401/503 protection, caused 46 % of the TRS assets to be put at risk in NYC/MAC bonds in order to "save the fiscal integrity of NYC." No rational connection was offered or shown between the use of the assets of the TRS pensioners' fully-funded system, and the fiscal preservation of NYC.

[20] Many taught in NYC at low salaries because they could look forward to a city pension on retirement. This was a reasonable investment for the future. "In NYC . . . in 1894 . . . [occurred] the establishment of the first teachers retirement system in the United States." W.C. Greenough & F.P. King Pension Plans and Public Policy. Columbia University Press. 1976 p. 50.

". . . When a State . . . burdens the exercise of a fundamental right, its attempt to justify the burden as a rational means for the accomplishment of some state policy requires more than the unsupported assertion . . . that the burden is connected to such a policy. . . ." *Carey* v. *Population Services International,* 45 L.W. 4601 (1977), #75-443.

"Equal protection analysis requires a strict scrutiny of a legislative classification when . . . [it] interferes with a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976).

2. Suspect Class.

Suspect class standards were suggested in *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 16 (1973). The plaintiff and the TRS pensioner minority are a suspect class:

(a) They are saddled with disabilities; 86% are over 65 years old; 35% are over 75; many are ill and isolated; most are poor, unemployable, unorganized, unrepresented, defenseless and vulnerable.

(b) They are politically powerless. TRS pensioners are not allowed to vote for any TRS trustee. The active teachers are allowed to elect three teacher TRS trustees with the power of veto over investments. TRS pensioners have received no cost-of-living allowance increase since 1969.

(c) They are subject to purposeful unequal treatment as shown below.

3. Unequal Protection.

PL 94-236 violates the equal protection clause of the Fifth Amendment because it singles out, treats differently and discriminates against the plaintiff and former NYC employee pensioners by excluding them from the protec-

tion of 26 USC 401/503. 10.8 million other past and present state and municipal employee members of contributory pension funds are still protected by 26 USC 401/503.

> ". . . A statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found. . . ." *Morey* v. *Doud,* 77 S.Ct. 1350 (1957) quoting *Royster Guano* v. *Va.,* 253 U.S. 412 (1920). See also *Railway Exp. Agy.* v. *N.Y.,* 336 U.S. 106 (1949).

PL 94-236 is not a uniform tax law as required by *Article 1, Section 8* of the U.S. Constitution.

A taxing act which shows oppressive discrimination denies equal protection. *Welch* v. *Henry,* 305 U.S. 135 (1938).

A law repugnant to the Constitution is void. *Marbury* v. *Madison,* 1 Cranch 137, 2 L.Ed. 60.

IV

The Decision Below on Standing for Administrative Review Is Not Consistent With the Applicable Decision of This Court.

The District Court, in denying standing to sue the IRS, stated:

> "The agency did not mandate the investment; it simply ruled that the investments would not jeopardize the retirement fund's tax-exempt status. This action is so many levels removed from the interest asserted by the plaintiff that the Court is unable to conclude that Kirshner has standing to challenge it." (p. 23a, App. B)

The Second Circuit agreed giving no further reasons. The *Duke Power,* 46 LW 4845, decision said that the Price-Anderson Act did not mandate the building of nuclear power plants. It simply fixed the liability limit in the

event of a nuclear explosion. The Court ruled that "but for" the Price-Anderson Act there was a substantial likelihood that Duke Power would not have built the plant. The "but for" connection met the causal requirement for standing for the plaintiffs in that case.

In this case TRS trustees requested the IRS to approve what they knew to be a prohibited transaction under 26 USC 401a/503b. They illegally circumvented this violation of the law by a purposeful misleading statement in their letter of December 4, 1975 to Commissioner of Internal Revenue, page five:

> *Assumption of Fact*
>
> "For purposes of this ruling request, we ask that you assume that each of the New York City Employees' Retirement System and the City of New York constitutes a 'governmental plan' within the meaning of Code section 414(d) and (2) that the proposed purchase of the $130 million of New York City bonds on December 5, 1975 will satisfy the four (4) investment requisites set forth in Rev. Rul. 69-494."

The response came from Alvin D. Lurie, Assistant Commissioner IRS dated December 5, 1975, page four:

> ". . . (2) Assuming, as you request, that the proposed purchases of the $130 million of NYC bonds on December 5, 1975 will satisfy the four investment requisites set forth in RR 69-494-2C.B. 88, the Service will not challenge the qualification of the Trusts on the ground that the proposed purchases violate the "exclusive benefit rule" of section 401(a) of the Code. . . ."

IRS Assistant Commissioner Lurie knew that 26 USC 401a required full disclosure. He could easily have determined that the proposed NYC bond purchase violated three of the four requisites of RR 69-494/401a by concealing: (a) that the purchase at par was 20% above market price.

(b) that sound corporate bonds would be sold at a loss because the previous purchase of $265 million MAC bonds were financed by just such a TRS sale of corporates at a loss of $20 million. (c) that the purchase would bring the NYC/MAC holding to 32% of fixed assets for TRS, a negation of diversity and prudence. (See footnote 13, page 11.)

Mr. Lurie's decision was also in violation of 503(c)-1(b)(1) and RR 70-131, which defined "adequate security."

"But for" IRS Assistant Commissioner Lurie's letters of December 5 and 13, 1975 the TRS trustees would not have bought the NYC bonds at above market price nor would they have sold sound corporate bonds at a $30 million loss to get the funds to buy them. The causal connection between the acts of the TRS trustees and IRS Mr. Lurie and the injury to the plaintiff as owner of his share of TRS assets including the contributory savings Annuity Reserve Fund, is thus satisfied by the "but for" analysis as in *Duke Power*.

Remedies available under 26 USC 706 could redress the injuries that resulted from the IRS approval.

An alternative remedy would be revoking TRS tax exemption for violation of 26 USC 401a/503b. The potential benefit to TRS is demonstrated by the report in the *N.Y. Times* of July 20, 1977, page 18. The IRS held in suspension the revocation of tax exemption for the Teamsters Central States Pension Fund while prompting reforms in investment policy and transfer of asset management from Teamster trustees to outside investment firms.

The plaintiff meets the Duke Power requirements for standing through distinct injury traceable to the actions of IRS Assistant Commissioner Lurie, whose failure to investigate the fraudulent assumptions of TRS trustees in violation of his duty, caused the injury.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED KIRSHNER, *Pro Se*
98 Van Cortlandt Park South
Bronx, New York 10463

March 12, 1979

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 315—September Term, 1977.

(Argued January 18, 1978 Decided November 30, 1978.)

Docket No. 77-6104

ALFRED KIRSHNER,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA, SECRETARY OF THE TREASURY, COMMISSIONER OF I.R.S., ALVIN D. LURIE, in his capacity as Assistant Commissioner Employer Plans and Exempt Organizations, I.R.S., BERNARD GOLBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, VICTOR CONDELLO, HARRISON J. GOLDIN, JAMES REGAN, individually and as Trustees of the Teachers Retirement System of the City of New York, and ISAIAH ROBINSON,

Defendants-Appellees.

Before:

MOORE, SMITH and MANSFIELD,

Circuit Judges.

Action for injunctive and other relief brought by a beneficiary of a municipal pension fund against the trustees of the fund and others alleging violations of the federal securities laws, breach of fiduciary duty, and other claims.

The District Court for the Southern District of New York, Lawrence W. Pierce, *Judge*, dismissed the complaint in its entirety and entered judgment accordingly. The Court of Appeals held that plaintiff had standing to sue under the federal securities laws.

Affirmed in part, reversed in part and remanded for further proceedings.

ALFRED KIRSHNER, *Appellant Pro Se.*

KENT T. STAUFFER, Assistant U.S. Attorney (Robert B. Fiske, Jr., U.S. Attorney for the Southern District of New York, Patrick H. Barth, Assistant U.S. Attorney, of counsel), *for Appellees United States of America, Secretary of the Treasury, Commissioner of I.R.S., and Alvin D. Lurie.*

LEONARD KOERNER (W. Bernard Richland, Corporation Counsel, City of New York, James G. Greilsheimer, L. Kevin Sheridan and Judith A. Levitt, of counsel), *for Appellees, Trustees of Teachers Retirement System.*

SMITH, *Circuit Judge*:

This is an appeal from a judgment dismissing an action brought by a beneficiary of a municipal pension fund against the trustees of the fund and others alleging deprivation of constitutionally protected rights, violations of the federal securities laws, and breach of fiduciary duty under state law, and seeking injunctive, declaratory and other relief. The United States District Court for the Southern District of New York, Lawrence W. Pierce, *Judge*, held that appellant lacked standing to sue under the federal

securities laws, and dismissed the complaint in its entirety, entering judgment accordingly. We find that appellant has standing to sue under the federal securities laws, and reverse the dismissal as to the individuals sued as fund trustees.

For the purpose of this appeal from a judgment granting a motion to dismiss, we treat allegations of the complaint as admitted. *Drachman* v. *Harvey*, 453 F.2d 722, 724 (2d Cir. 1972); *Murray* v. *City of Milford*, 380 F.2d 468, 470 (2d Cir. 1967).

I.

The facts alleged may be summarized as follows.

Appellant, Alfred Kirshner, was employed as a high school science teacher by the Board of Education of the City of New York from 1928 to 1953. During these years he was obliged to contribute to the Teachers Retirement System of the City of New York ("the System") by means of compulsory payroll deductions credited to the System's annuity savings fund. The City of New York ("the City") was required to pay into the System's contingent reserve fund amounts sufficient to provide for a pension reserve at the time of his retirement. At Kirshner's retirement in 1953, accumulated deductions were transferred on the books of the System to the System's annuity reserve fund and an amount equal to the employee's pension reserve was transferred to the System's pension reserve fund number one. Since then he has received monthly retirement allowances consisting of an annuity and a pension. In 1976 his retirement allowances totaled $3,035.68.

The System is controlled by the Teachers Retirement Board ("the Board"). The Board has the power to purchase securities for and to sell securities held by any of

the System's funds. The Board's seven members are trustees for the fund. Three are elected by active employees of the Board of Education. The concurrence of at least one of these three is necessary for any decision of the Board. Retired employees have no representative on the Board.

As of June 30, 1974, about a year before the beginning of the City's financial crisis, the System had $1.85 billion in assets and $4.62 billion in accrued liabilities. Apparently, amounts paid in by the City had not been enough to establish adequate pension reserves. Of the $1.85 billion in assets, $1.62 billion had been transferred into the annuity reserve fund or the pension reserve fund number one or successor funds. The remaining $0.23 billion was held in the annuity savings fund and the contingent reserve fund or their successor funds. Of the $4.62 billion in accrued liabilities, $1.62 billion was owed to reserves for retired employees and $3 billion was owed to reserves for active employees. Thus, there was only $0.23 billion set aside for pensions of active employees although the System had outstanding retirement obligations to these employees of $3 billion. Consequently, when the City's crisis began, the principal concern of retired employees was protecting the integrity of the System's annuity reserve fund and pension reserve fund, or successor funds, while the interests of the Board of Education's active employees lay in assuring that the City had funds to put into the System, so that the employees' retirement allowances could be paid when they became due, and in seeing to it that the City was able to pay their salaries.

In June, 1975 the Legislature of the State of New York instituted the first of several steps in response to the City's financial plight. It established the Municipal Assistance

Corporation for the City of New York ("MAC") "to assist the city of New York in providing essential services to its inhabitants . . . and in creating investor confidence in the soundness of the obligations of such city . . . ." 1975 N.Y. Laws, ch. 169 §3031. MAC was authorized to issue up to $3 billion in notes and bonds. It was to purchase and accept for exchange short-term obligations of the City. On September 9, 1975, the Legislature passed the New York State Financial Emergency Act for the City of New York ("the Emergency Act") which "authorized and directed" certain purchases of MAC bonds and declared these bonds "reasonable, prudent and proper investments for . . . all trustees and other fiduciaries . . . ." 1975 N.Y. Laws, ch. 870 §1. The System was obliged to purchase bonds in the principal amount of $250 million. On September 29, 1975, however, the Court of Appeals of the State of New York struck down that portion of the Emergency Act which "directed" pension fund trustees to invest in MAC bonds as violative of the constitution of the state. Nevertheless, on October 17, 1975, to enable the City to avoid default, the Board agreed to acquire MAC bonds in the principal amount of $150 million. Concurrence of Board members elected by active employees followed concessions to active employees in contract negotiations between the City and representatives of the active employees. Still the crisis deepened. On November 15, 1975, the City defaulted on its maturing short-term obligations and declared a moratorium on all payments. Between August 21, 1975 and November 20, 1975, the Board purchased MAC bonds in the principal amount of $275 million for the System's funds.

On November 25, 1975 MAC, several commercial banks, and five City pension systems entered into an agreement ("the Agreement") pursuant to which the Board agreed to

acquire City serial bonds in the principal amount of at least $860 million over a period of about 30 months. In addition on February 1, 1976 the Board agreed to exchange the MAC bonds held by the System for long-term MAC bonds bearing 6% interest per year.

The banks, according to the complaint, "while ostensibly acting as disinterested parties, while using their reputations for fiscal integrity and sound business judgment to induce the 'TRUSTEES' to purchase $860 million of NYC serial bonds, failed to make full disclosure of the fact that they had sold over $2 billion of their NYS short term notes in the previous year." The banks "fail[ed] to disclose the extent and dollar value of the City bonds held by them as assets and as trustee and fiduciary for clients, [thereby] concealing material facts that would affect an informed investment decision." It is further alleged that the members of the Board, when entering into the Agreement, "were well aware that buying NYC bonds at that time was wrongful because the City was insolvent. In April 1975 Standard & Poor had completely suspended rating NYC bonds. Moody's had downrated them to unsatisfactory Caa on November 3, 1975. . . . Not one bank, insurance company, investment company, trade union fund or corporation in the USA would at that time advance NYC any funds, but the 'TRUSTEES' volunteered to advance $860 million of the assets of the plaintiff . . . ." Moreover, the Board "accepted the reduced 6% rate on Moody-rated B (unsatisfactory) MAC bonds at a time when A's were selling with 8% to 9% returns at par."

The Agreement provided that the System's purchase of City bonds was contingent upon either the issuance of a ruling by the Internal Revenue Service ("IRS") or the enactment of federal legislation providing that the proposed purchases shall not constitute "prohibited transactions" within the meaning of § 503(b) of the Internal Revenue Code of 1954, as amended ("the Code"), or otherwise adversely affect the tax status of the System's pension funds under § 401(a) of the Code.

On December 4, 1975, the Board requested the IRS to rule that certain purchases of City serial bonds would not result in "prohibited transactions" or violate any provisions of § 401(a). However, it is alleged that "in their requests to IRS for approval [the Board] did not make full disclosure in five instances which indicate violations of Security Exchange laws and regulations 10(b) and Rule 10b-5." It did not disclose (1) that the banks had sold City obligations in the previous year; (2) that City serial bonds were to be purchased at par when available at a discount; (3) the purchases would increase fund holdings of City obligations "to 32%"; (4) the Board intended to sell sound corporate bonds to raise cash to make these purchases; (5) the purchases were not for the exclusive benefit of the beneficiaries.

Alvin D. Lurie, an Assistant Commissioner of the IRS, issued the requested rulings. Shortly thereafter, the Board allegedly sold "sound, liquid, varied, highly-rated corporate bonds" to buy "highly speculative, poorly rated, illiquid, high risk NY City obligations," and purchased "at par $182 million NYC serial bonds which were available at discounts [of approximately 20%]." These purchases "increased the [pension funds'] holdings of NYC obligations as of December 15, 1975 to 32%."

On February 1, 1976, pursuant to the Agreement, the System exchanged MAC bonds in the principal amount of $215 million for a like amount of long-term MAC bonds bearing interest at 6% per year. The bonds which it gave

up were short-term obligations bearing interest at 11% per year.

In February, 1976 hearings were held on special federal legislation which would provide that parties to the Agreement would not be considered to violate § 401(a) or § 503 (b) of the Code as a result of purchases or acquisition of MAC or City serial bonds. On March 19, 1976 Congress enacted Public Law 94-236 which granted such protection of all parties for all such purchases or acquisitions made on or after August 20, 1975.

By December 31, 1976 the Board had "increas[ed] the [funds'] holding[s] of NYC obligations to $782 million or 36% of total assets." The Board voted to acquire these bonds "[i]n order to maintain . . . contract benefits, full employment at high wages and high city pension contributions to benefit the presently employed teachers . . . ." As a result of the Board's actions, the assets of the pension funds have been "leached and dissipated." The "funds are being used to pay off NYC bonds owned by the Clearing House Banks and their clients at the expense of the minority pensioners, including plaintiff."

Under the Agreement, the Board was obliged to purchase additional City serial bonds in the principal amount of $504 million by June 30, 1978, "making 51% of [the System's] assets NYC obligations . . . ."

II.

In February, 1977, Kirshner *pro se* commenced the instant action against the United States of America, the Secretary of the Treasury, the Commissioner of the Internal Revenue Service, Alvin D. Lurie in his capacity as Assistant Commissioner of the Internal Revenue Service,

and named members of the Board, individually and as trustee of the System's funds.

In his complaint, in addition to the facts alleged above, Kirshner claims that "the 'TRUSTEES' intent to manipulate and deceive was expressly indicated by the 'AGREEMENT.' "

He maintains that "[t]he 'AGREEMENT' was tainted by fraud by 'concealing material facts to which importance could be attached that would affect informed investment decision,' " and states that the Agreement "was not made at arms length." The conduct of the members of the Board, Kirshner contends, violates § 17(a) of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. § 77q, § 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and constitutes a breach of fiduciary duty under state law. In addition, Kirshner alleges that federal and state appellees have deprived him and other retired employees of constitutional rights granted by article I, § 10 and by the fifth and fourteenth amendment to the Constitution of the United States, and that Public Law 94-236 is unconstitutional.

As relief Kirshner seeks a declaration that Public Law 94-236 is unconstitutional and an injunction preventing its application, an order setting aside the alleged IRS rulings, an order prohibiting the Board members from purchasing additional City obligations, another order requiring them to exchange the MAC bonds bearing 6% interest for those purchased initially, and, finally, restitution for all losses incurred as a result of entering into and carrying out the terms of the Agreement.

Appellees moved separately to dismiss Kirshner's complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

Kirshner cross-moved for a preliminary injunction. The district court, holding that Kirshner lacked standing to sue under the federal securities laws, granted the motions to dismiss and denied the cross-motion as moot. Kirshner appealed from the district court's order and we assumed jurisdiction.[1]

III.

We agree with the district court that no basis is stated for the action against the United States and the federal officials. That claim is based on Public Law 94-236 and on the IRS ruling that the contemplated transactions would not constitute "prohibited transactions" which would deprive the securities of their tax-exempt status under the federal statutes. We fail to see in the claim any harm to the plaintiff or the funds, or any basis for the plaintiff's standing to challenge the ruling.

Kirshner makes a constitutional claim of impairment of the obligation of contract. But while his pension rights arise from a contract,[2] his claims of impairment must fail. Article I, § 10 of the Constitution of the United States declares that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." This prohibition, however, "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398,

1 The judgment entered below dismissed the complaint, but not the action. Appellees have not raised this issue on appeal. However, under 28 U.S.C. § 1292, jurisdiction may be predicated upon the district court's denial of appellant's cross-motion for a preliminary injunction.

2 The Constitution of the State of New York, article V, § 7 provides that after May 1, 1940, membership in any pension or retirement system of a civil division of the state "shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

428 (1934). A state may take necessary measures in pursuit of legitimate state goals without bar by the contract clause even though some contract rights may to some degree be modified or affected. *City of El Paso* v. *Simmons*, 379 U.S. 497 (1965); *Home Building & Loan Ass'n* v. *Blaisdell, supra*, 290 U.S. at 398; *Koch* v. *Yunich*, 533 F.2d 80, 86 (2d Cir. 1976). The protection of the fiscal integrity of the City of New York is such a legitimate state goal. The Board's members are authorized by state law to invest in both MAC and City serial bonds. Administrative Code of the City of New York, ch. 20 § 1320.31.0; N.Y. Public Authorities Law § 3018 (McKinney Supp. 1970-77); N.Y. Banking Law § 235(4) (McKinney 1971); *Tron* v. *Condello*, 427 F. Supp. 1175, 1187-88 (S.D.N.Y. 1976). These state laws appear to be necessary to a valid state purpose —protecting the fiscal integrity of the City by broadening the available markets for its securities—and therefore not in contravention of article I, § 10 of the Constitution.

Kirshner's constitutional claim of deprivation of property without due process also affords him no relief. The federal and state enactments pursuant to which the challenged actions were carried out are rationally related to lawful governmental objectives and are not unreasonable, arbitrary or capricious. Assuming, *arguendo*, that Kirshner has constitutionally protected property right, see *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Tron* v. *Condello, supra*, 427 F. Supp. at 1189; *Robbins* v. *Police Pension Fund*, 321 F. Supp. 93, 97 (S.D.N.Y. 1970), he cannot be said to have been deprived of that right without substantive or procedural due process. See generally *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934); *Koch* v. *Yunich, supra*, 533 F.2d at 84. Nor has Kirshner been denied equal protection of the laws by either the federal or state enact-

ments, for he has not demonstrated any arbitrary or unreasonable classification in the statutes. See *Reed* v. *Reed*, 404 U.S. 71, 76 (1971).

Kirshner's claim that Public Law 94-236 and the IRS rulings violate the fifth and fourteenth amendments is likewise without merit. Their effect is solely to remove any question as to the tax exempt status of the securities involved and could only benefit, rather than damage, the City and its creditors. The district court was correct in dismissing appellant's constitutional claims.

The situation is different, however, as to the Securities Acts claims against the non-federal defendants. We are concerned at this point only with whether Kirshner has alleged facts sufficient to give him standing to sue under the securities laws and to form a basis for relief if liability is established on trial. We, of course, intimate no opinion as to the truth of his allegations. The court below, citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), held that Kirshner lacks standing to assert a private cause of action under § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b)[3] and Rule 10b-5, 17 C.F.R. § 240.10b-5,[4]

3 Section 10(b) of the 1934 Act makes it

unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

4 Rule 10b-5 reads:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) To employ any device, scheme or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

promulgated thereunder. We disagree. To be sure, in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), affirming dismissal of a derivative action against a director for violation of § 10(b) where the director had sold his shares in the corporation to an outside purchaser, we stated that § 10(b) and Rule 10b-5 "extended protection only to the defrauded purchaser or seller," *id.* at 464.

Since its promulgation in 1952, the *Birnbaum* rule has been adhered to consistently in this circuit; see *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1346 n. 16 (2nd Cir.), *cert. denied*, 417 U.S. 932 (1974). We have, however, recognized that a shareholder who has not purchased or sold shares may bring a derivative action under § 10(b) against corporate insiders on behalf of the defrauded corporation if the corporation has bought or sold securities. *Schoenbaum* v. *Firstbrook*, 405 F.2d 215, 219 (2d Cir. 1968), *cert. denied sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969); *Ruckle* v. *Roto American Corp.*, 339 F.2d 24, 27-28 (2d Cir. 1964). And in approving the *Birnbaum* rule in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, 421 U.S. 723, the Court took cognizance of this interpretation of the rule, *id.*, at 948-49.

We think the beneficiary of a pension trust, like the shareholder in a derivative suit, has standing to attack securities frauds perpetrated or threatened by the trustees of his fund. A number of courts have taken the view that a trust beneficiary may sue under Rule 10b-5. See, *e.g.*, *James* v. *Gerber Products Co.*, 483 F.2d 944 (6th Cir. 1973);

Heyman v. *Heyman*, 356 F. Supp. 958 (S.D.N.Y. 1973). Treating the allegations of the *pro se* complaint liberally as we must under *Haines* v. *Kerner*, 404 U.S. 519 (1972), it would appear that purchase and sale of securities is sufficiently involved, see *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), and that the plaintiff has also alleged the knowledge and intent to defraud required by *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).[5]

The court below also held that Kirshner has no claims under § 17a of the 1933 Act, 15 U.S.C. § 77q, because no private cause of action is recognized under this section. We disagree with this conclusion. See *Daniel* v. *International Bhd. of Teamsters*, 561 F.2d 1223, 1244-46 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3512 (Feb. 21, 1978).[6]

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5 The dissent evidences concern that the provisions of the Employee Retirement Security Act of 1974 (ERISA), particularly requirements concerning disclosure, preclude a cause of action under the Securities Act in this case. We believe that this concern is misplaced. First, it is not at all clear that the specific requirements of ERISA preclude actions under the broader requirements of the Securities Acts. See *Daniel* v. *International Bhd. of Teamsters*, 561 F.2d 1223, 1248 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3512 (Feb. 21, 1978). (ERISA should be read as "complementary" to the anti-fraud provisions of the Securities Acts.) Second, the cause of action here does not stem from a specified duty to disclose on the part of the trustees. In addition to a general duty of disclosure, *James* v. *Gerber Products Co.*, 483 F.2d 944 (6th Cir. 1973), plaintiff's complaint, read liberally, alleges a conspiracy to defraud in violation of Rule 10b-5, which is in no way tied to a specified duty of disclosure. See *Ferguson* v. *OmniMedia*, 469 F.2d 194 (1st Cir. 1972); *Herpich* v. *Wilder*, 430 F.2d 818 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

6 See also, *Newman* v. *Prior*, 518 F.2d 97 (4th Cir. 1975); *Surowitz* v. *Hilton Hotels Corp.*, 342 F.2d 596 (7th Cir. 1965); *Wulc* v. *Gulf & Western Ind.*, 400 F. Supp. 99 (E.D. Pa. 1975); *contra*, *Shull* v. *Dain, Kalman & Quail, Inc.*, 561 F.2d 152 (8th Cir. 1977); *Scarfaretti* v. *Bache & Co.*, 438 F. Supp. 199 (S.D.N.Y. 1977); *Gunter* v. *Hutcheson*, 433 F. Supp. 42 (D. Ga. 1977); *Architectural League of New York* v. *Bartos*, 404 F. Supp. 304 (S.D.N.Y. 1975); *Welch Foods* v. *Goldman Sachs*, 398 F. Supp. 1393 (S.D.N.Y. 1974).

We left the question open in *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1283-84 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970), noting, however, Judge Friendly's remark concurring in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968), that there was little practical point in denying the existence of an action under § 17 once it is established that an aggrieved buyer has a private action under § 10(b) of the 1934 Act.

We agree with the Seventh Circuit that the language of § 17 is broad enough to imply a private right of action and that the beneficiaries of the trust are persons claiming injury for the alleged fraud in purchase and sale of securities.

Kirshner has standing, as a beneficiary of the fund, to bring this action on behalf of the fund against those alleged to have defrauded the fund in its purchase of securities, and the complaint may be interpreted to charge participation by these defendants in fraudulent sale of securities by and to the fund.

The district court dismissed Kirshner's state law claims for breach of fiduciary duty. Since Kirshner states a claim under § 10(b) and § 17, on remand he may assert his pendent state claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Of course, as we have said, we intimate no opinion as to the merit of any of the claims.

Judgment reversed. Dismissal of Rule 10b-5 and § 17 claims and pendent state law claims reversed. Dismissal of other claims affirmed. Case remanded for proceedings not inconsistent with this opinion.

MOORE, *Circuit Judge* (Dissenting):

I would affirm, largely for the reasons set forth in Judge Pierce's well-reasoned opinion.

Plaintiff is the recipient of a pension from the New York City Teachers' Retirement System. He retired in 1953 and since then has been on a pension——$3,000 a year. There is no allegation that any of the acts complained of have caused his pension to cease or payments to have been diminished. Indeed, paragraph 9b of his complaint reveals that he is unable to allege any injury to his interests because his retirement account was fully funded at the time of his retirement and apparently has remained fully funded up to this day. Furthermore, his actuarial calculations show that his expectant lifetime pension is $39,000; the $1.6 billion in the Funded Assets Account of the Retirement System amounts to $64,600 for each retiree, more than enough to fund his expected pension. Hence, Kirshner has not been injured by the acts complained of. *See Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970).

Not only has Kirshner failed to allege facts to support his standing to sue, but also, as appears from Judge Pierce's opinion, he has failed to state a cause of action on his non-securities law claims. The gravamen of his complaint is that certain investments in New York City bonds made recently, at a time when the City was in dire financial straits, were improvident. In view of the prominence given to the City's financial plight in the public press, I am willing to take judicial notice that investment in its securities would be highly questionable. However, in addition to the many burdens placed upon the judiciary, I am unwilling to add that of investment counsel to an employees pension fund to the list. Support for this position is found in a decision of New York's highest court in *Sgaglione* v. *Levitt*, 37 N.Y.2d 507 and in Judge Conner's decision in *Tron* v. *Condello*, 427 F.Supp. 1175 (S.D.N.Y. 1976). Whatever relief, if any, to which plaintiff may be entitled may be had through the state

courts where breach of fiduciary duty may be asserted and equitable relief and damages, if any, awarded.[1]

The majority opinion supports most of Judge Pierce's decision and disagrees only with his treatment of Kirshner's securities law claims. Even if Kirshner has standing to bring this action, as the majority finds he does, his complaint should still be dismissed for failure to state a cause of action under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and § 17 of the Securities Act of 1933, 15 U.S.C. 77q. In my opinion, the majority's holding that the complaint states a cause of action under § 10(b) and § 17 constitutes an ill-advised extension of the reach of the antifraud provisions of the securities laws as they have been applied to allegations of corporate mismanagement.[2]

There has been a tendency over recent years to rely upon various sections of the Security Exchange laws to create causes of action by the recital of section numbers such as § 10(b), Rule 10-b(5) and § 17, as if the mere recital had a talismanic effect and would bring some kind of a triable action into being.

The private cause of action under § 10(b) was created by federal courts in order to effectuate congressional policies arguably embodied in the securities legislation passed in 1933 and 1934. Thus the broad extension of the private § 10(b) action has not been mandated by Congress; it

1 The availability of a state court remedy for breaches of fiduciary duty and the traditional role of state law in regulating trust fund fiduciaries add additional support to my belief, explained later in the text, that Kirshner has failed to state a cause of action under § 10(b). *See Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 478 (1977).

2 *See Santa Fe Industries* v. *Green*, 430 U.S. 462, 475 n.15 (1977) and the cases cited therein; Jacobs, *How Santa Fe Affects 10b-5's Proscriptions Against Corporate Mismanagement*, 6 Sec. Reg. L.J. 3 (1978).

is rather a matter of the courts seeking to erect a rational enforcement system on a very shaky base. However, a rational enforcement system ought to take into account the latest efforts of Congress to regulate retirement trust fund managements. In the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381, Congress has established detailed and complex rules to control pension fund managers. In pertinent part, ERISA provides that pension fund trustees have a duty of undivided loyalty to the beneficiaries, 29 U.S.C. § 1104, and regulates the extent to which a pension fund can hold securities issued by the employer, 29 U.S.C. §§ 1106-1107. ERISA contains complex disclosure and reporting requirements, but nowhere does it require that trustees must disclose in advance to the beneficiaries their proposed investment transactions, 29 U.S.C. §§ 1021-1026. If Congress had wanted to require pension fund trustees to disclose investment transactions, Congress would have enacted such a rule. Although this case involves a public employee pension fund, the majority's holding that a pension beneficiary has a cause of action against the trustee is equally applicable to private pension funds which are covered by ERISA. Moreover, since Congress has elected not to burden municipal employee pension funds with ERISA's requirements, 29 U.S.C. § 1003, a federal court should not create a new disclosure duty on the dubious foundation of § 10(b) and apply it to public employee pension funds in this case. I would find that Kirshner's complaint has not stated a federal cause of action upon which relief can be granted.

In short, I believe that Judge Pierce has correctly analyzed the amended complaint (and the law applicable thereto) and found it wanting. With that analysis I concur and hence would affirm.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 665
(Pro Se)

ALFRED KIRSHNER,

Plaintiff,

—v.—

UNITED STATES OF AMERICA, SECRETARY OF THE TREASURY, COMMISSIONER OF THE IRS, ALVIN D. LURIE, in his capacity as Assistant Commissioner, Employer Plans & Exempt Organizations, IRS, BERNARD GOLDBERG, RUEBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, VICTOR CONDELLO, HARRISON J. GOLDIN, JAMES REGAN, individually and as Trustees of the Teachers' Retirement System of the City of New York, and ISAIAH ROBINSON,

Defendants.

APPEARANCES:

ALFRED KIRSHNER, Esq.
98 Van Cortlandt Park South
Bronx, New York 10463
Plaintiff, Pro Se

W. BERNARD RICHLAND, Esq.
Corporation Counsel of the City
of New York
By: JAMES G. GREILSHEIMER, Esq.,
Litigating Assistant Corporation Counsel
Municipal Building
New York, New York 10007
Attorney for the Trustees of the Teachers' Retirement System of the City of New York

ROBERT B. FISKE, JR.
United States Attorney for the Southern
District of New York
By: KENT T. STAUFFER, Esq.
WILLIAM G. BALLAINE, Esq.
Assistant United States Attorneys

Attorneys for the United States of America, et al.

LAWRENCE W. PIERCE, *D.J.*

MEMORANDUM AND ORDER

Plaintiff Alfred Kirshner brings this action seeking an injunction against certain investments made in securities of the Municipal Assistance Corporation by the defendant Trustees of the Teachers' Retirement System of the City of New York ("the Trustees"). Plaintiff also seeks judicial review of the actions of the Internal Revenue Service implementing special legislation passed by Congress, PL 94-236 (March 19, 1976), which statute permitted the Trustees to make the investments challenged herein without risking the loss of the System's tax exempt status. Finally, Kirshner seeks a declaratory judgment that PL 94-236 is unconstitutional and seeks an injunction barring its enforcement.

Plaintiff is a retired New York City school teacher, and he alleges a vested right in his $3,000 annual pension. The gravamen of the amended complaint is the claim that the investments made by the Trustees and approved by the IRS have and will continue to jeopardize plaintiff's interest in the financial integrity of the billion-dollar funded assets of the retirement system. Plaintiff has moved for a preliminary injunction; the defendants have moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The motions to dismiss are granted.

The amended complaint alleges that jurisdiction is present pursuant to 28 U.S.C. §1331 and 1343, as well as pursuant to the Administrative Procedure Act, 5 U.S.C. §702. It is claimed that the actions of the defendant Trustees have violated 42 U.S.C. §1983 by depriving plaintiff of his constitutional rights under the contract clause, Art. I, Section 10, and under the due process and equal protection clauses of the fourteenth amendment. The Trustees are also said to have violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934, as wel as Rule 10b-5 thereunder. Finally, the Trustees are charged with breach of fiduciary duty.

As against the defendant the United States, its agencies and its officers, plaintiff seeks review of administrative action, and a declaratory judgment pursuant to 28 U.S.C. §2201 that PL 94-236 is unconstitutional; plaintiff further seeks an injunction enforcing two provisions of the Internal Revenue Code, 26 U.S.C. §§401 and 403, which allegedly would bar the purchases at issue if not for the enactment of PL 94-236. Finally, plaintiff claims that the federal defendants have deprived him of due process in violation of the fifth amendment and of his contract rights under the contract clause; he also claims that the federal officials have violated the securities laws.

This action is not the first to raise a constitutional attack against the investment policies of New York City employee retirement pension funds. See *Sgaglione* v. *Levitt,* 37 N.Y. 2d 507, 337 N.E.2d 592, 375 N.Y.S.2d 79 (1975); *Withers* v. *Teachers' Retirement System,* 76 Civ. 4474 (S.D.N.Y. Dec. 22, 1976); *Tron* v. *Condello,* 427 F.Supp. 1175 (S.D.N.Y. 1976). These cases have carefully considered the facts and the law as it applies to this matter; thus many of the claims made here are capable of summary disposition based upon precedent which this Court finds highly persuasive.

Plaintiff's claim that the actions of the defendants violate the contract clause, Art. I, Section 10, must be dis-

missed for failure to state a claim. That provision grants to plaintiff no right to seek judicial review of the investment decisions of the Trustees. See *Sgaglione, supra; Tron* v. *Condello, supra,* 427 F.Supp. at 1188-89.

The same conclusion must be reached with respect to plaintiff's due process claims. While plaintiff may well have a vested property interest in his pension, he has no right to regulate the investment policies of the defendants. *Tron* v. *Condello, supra,* 427 F.Supp. at 1189-90. As Judge Conner observed in that case, to the extent plaintiff claims breach of fiduciary duty, that claim is cognizable in state court.

Kirshner makes an equal protection argument not raised in *Tron,* to wit, that the actions of the Trustees have discriminated against retired teachers while continuing to favor presently employed teachers. The Court concludes that this claim must similarly be dismissed for failure to state a claim, since it is but another method whereby plaintiff seeks to overturn the discretionary investment decisions made by the Trustees. See *Sgaglione, supra; Tron* v. *Condello, supra.* Indeed, even if plaintiff's equal protection argument were not foreclosed by the thrust of the state and federal decisions cited above, the claim must fall since the investment decisions of the Trustees have a rational basis and since the distinction between present and retired teachers is not a distinction which would be subjected to strict judicial scrutiny. Rather, under the "relatively relaxed standard" of judicial review, it is apparent that the actions of the Trustees bear a rational relationship to a legitimate state goal, i.e., the protection of the fiscal integrity of the City of New York. See generally *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 314 (1976) (*per curiam*); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). Accordingly, each of the three constitutional claims brought against the Trustees must be dismissed for failure to state a claim.

Nor do plaintiff's claims under the federal securities laws state a claim. It is undisputed that Kirshner was not a

purchaser or a seller of the securities in issue. Thus he has no standing to assert a private cause of action under Section 10(b) or under Rule 10b-5. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975). Further, plaintiff has no claim under Section 17(a) of the Securities Act since there exists no private cause of action based upon that statute. See *Welch Foods, Inc.* v. *Goldman Sacks & Co.,* 398 F.Supp. 139 (S.D.N.Y. 1974). Accordingly, all federal claims asserted against the Trustees must be dismissed. The pendent state law claims for breach of fiduciary duty must similarly be dismissed without prejudice to their assertion in a state court action. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966).

Plaintiff seeks review of the actions of the federal defendants pursuant to the Administrative Procedure Act, 5 U.S.C. §702. In order to seek review under that section, the plaintiff must be a "person aggrieved" by agency action. *Id.* A possible financial loss is not itself a sufficient interest to sustain a judicial challenge to agency action. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 153 (1967). The agency action challenged here is the approval by an Internal Revenue Service Assistant Commissioner of the investment plans of the Trustees. The agency did not mandate the investment; it simply ruled that the investments would not jeopardize the retirement fund's tax-exempt status. This action is so many levels removed from the interest asserted by the plaintiff that the Court is unable to conclude that Kirshner has standing to challenge it. The A.P.A. does not confer standing upon any person who might suffer financial loss as a result of agency action; rather, the action must directly violate plaintiff's vested legal rights. See *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency,* 310 F.2d 99, 104 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963). Plaintiff's "unadorned speculation" that the agency action will result in a direct injury to him is insufficient to confer jurisdiction under the A.P.A., or indeed, under

the Constitution's Article III, Section 2 generally. See *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 44 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 505 (1975). Further, plaintiff's other federal claims against the federal defendants are defective for the same reasons that they fail to state a federal claim against the Trustees.

Even if the Court were to proceed to the merits of plaintiff's claim that PL 94-236 is unconstitutional, it is clear that the attack must fail. The statute cannot violate the contract clause, since that section applies to state legislation, not to the enactments of Congress. *New York* v. *United States,* 257 U.S. 591, 602 (1922). The due process claim must fall since, for the reasons stated earlier, Kirshner has no vested property right in controlling the investment decisions of the Trustees. Nor is plaintiff deprived of any property right by reason of the alleged retroactive application of PL 94-236, since the law merely continued the tax exempt nature of the retirement fund, and since the retroactive period was sufficiently short to effect only the then-current fiscal year of the Teachers' Retirement System. Such a brief retroactive application does not serve to invalidate an income tax statute. See *United States* v. *Hudson,* 299 U.S. 498, 500-01 (1937). Accordingly, the due process attack on PL 94-236 must fall.

Under the cases cited previously, plaintiff's equal protection attack upon PL 94-236 must fail since the legislation has a reasonable relationship to the legislative goal, i.e., the fiscal preservation of the City of New York. See, e.g., the legislative findings set forth in the New York Seasonal Financing Act of 1975, 31 U.S.C. §1501. Further, the classification between present and retired teachers is not one which requires strict scrutiny of the Congressional action. See *Massachusetts Board of Retirement, supra;* cf. *Christian Echoes National Ministry, Inc.* v. *United States,* 470 F.2d 849, 857 (10th Cir. 1972), *cert. denied,* 414 U.S. 864 (1973).

For the foregoing reasons, it is apparent that plaintiff's complaint fails to state any federal claim upon which relief can be granted. Even under the less stringent standard applied to *pro se* complaints, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957); see *Haines* v. *Kerner,* 404 U.S. 519 (1972) (*per curiam*). The motions to dismiss are hereby granted. Plaintiff's cross-motion for a preliminary injunction is denied as moot. The complaint is dismissed.

So Ordered.

Dated: New York, New York
June 13, 1977

/s/ Lawrence W. Pierce
Lawrence W. Pierce
U.S.D.J.

APPENDIX C

Public Law 94-236

RELEVANT STATUTE

Public Law 94-236, provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) any pension plan or trust which, on December 5, 1975, was a party to the amended and restated agreement of November 26, 1975, set forth on pages S21308, S21309, and S21310 of the Congressional Record published on such date, and any trust forming a part of such a plan, shall not be considered to fail to satisfy the requirements of section 401(a) of the Internal Revenue Code of 1954, and shall not be considered to have engaged in a prohibited transaction described in section 503(b) of such Code, merely because such plan or trust does any or all of the following:

(1)(A) enters into such agreement or agrees to an amendment of such agreement;

(B) forebears from any act prohibited by such agreement;

(C) acquires or holds any obligation the acquisition or holding of which is provided for by such agreement;

(D) makes any election provided for by such agreement;

(E) executes a waiver of any requirement of such agreement;

(F) after the expiration of such agreement, holds any obligation acquired or held pursuant to such agreement; or

(G) performs any other act provided for by such agreement;

(2) on or after August 20, 1975, and before January 1, 1979, considers, for purposes of determining investments to be made by the plan or trust, the extent to which such investments will—

(A) maintain the ability of the city of New York—

(i) to make future contributions to the plan or trust, and

(ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan or trust, and

(B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust; or

(3) after December 31, 1978, considers, for purposes of determining whether to retain investments held on December 31, 1978, the factors enumerated in paragraph (2).

For purposes of paragraph (1), the acquisition or holding of any obligation of the Municipal Assistance Corporation for the city of New York on or after August 20, 1975, and before November 26, 1975, shall be considered an acquisition or holding provided for by such agreement.

"(b) In the case of—

(1) any amendment to the agreement described in subsection (a) which relates to the application of the factors set forth in subsection (a) to the requirements of section 401(a) or 503(b) of the Internal Revenue Code of 1954 and which is adopted after December 5, 1975, and

(2) any waiver of any requirement of the agreement by a plan or trust after December 5, 1975,

such amendment or waiver shall take effect for purposes of subsection (a) on the date on which a copy of such amendment or waiver is submitted directly to the Secretary of the Treasury; except that, if the Secretary determines, not later than 30 days after such date of submission (or, if later, the date of the enactment of this Act) that the taking effect of such amendment or waiver for purposes of subsection (a) is inconsistent with the considerations set forth in subsection (a)(2), such amendment or waiver shall not be deemed to have been effective for any period for purposes of subsection (a). No amendment to the agreement which has the effect of extending the expiration date of the agreement to a date later than December 31, 1978, shall take effect for purposes of subsection (a).

"(c) The trustees of each pension plan or trust described in subsection (a) shall furnish a copy of the annual report filed by such plan or trust with the New York State Insurance Department for each fiscal year of the plan or trust beginning after June 30, 1975, and ending with the first fiscal year in which there are no obligations with respect to which subsection (a) applies, to the Secretary of the Treasury not later than 30 days after the date such report is filed with the New York State Insurance Department, and shall furnish such additional reports and other information as the Secretary of the Treasury may reasonably require. A copy of each such report shall be furnished by the Secretary of the Treasury to the chairman of the Committee on Ways and Means of the House of Representatives and the chairman of the Committee on Finance of the Senate.

"(d) The Secretary of the Treasury or his delegate is authorized to prescribe such regulations as may be necessary to carry out the purposes of this Act.

"(e) This Act shall be effective on and after August 20, 1975."

Supreme Court, U. S.
FILED
MAY 4 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-1403

ALFRED KIRSHNER,

Petitioner,

v.

UNITED STATES OF AMERICA, SECRETARY OF TREASURY, COMMISSIONER OF THE IRS, ALVIN D. LURIE, in his capacity as Assistant Commissioner, Employer Plans and Exempt Organizations, IRS, BERNARD GOLDBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, VICTOR CONDELLO, HARRISON J. GOLDIN, JAMES REGAN, individually and as Trustees of the Teachers Retirement System of the City of New York and ISAIAH ROBINSON, individually as former Trustee of Teachers Retirement System,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of the
City of New York,
Attorney for Municipal
Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 566-6881

LEONARD KOERNER,
JUDITH LEVITT,
of Counsel.

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IN THE
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UNITED STATES OF AMERICA, SECRETARY OF TRESURY, COMMISSIONER OF THE IRS, ALVIN D. LURIE, in his capacity as Assistant Commissioner, Employer Plans and Exempt Organizations, IRS, BERNARD GOLBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, VICTOR CONDELLO, HARRISON J. GOLDIN, JAMES REGAN, Individually and as Trustees of the Teachers Retirement System of the City of New York and ISAIAH ROBINSON, individually as former Trustee of Teachers Retirement System,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Preliminary Statement

This is an action for declaratory and injunctive relief relating to the investments made by the Trustees of the New York City Teachers Retirement System of the City of New York in securities of the Municipal

Assistance Corporation and New York City Serial Bonds, pursuant to the Amended and Restated Agreement of November 26, 1975 between eleven New York City commercial bank and the New York City pension and sinking funds.

On June 17, 1977, the District Court for the Southern District Court of New York entered a judgment dismissing the complaint. The complaint had alleged that the investments by the trustees of the Teachers Retirement System in a New York City securities violated the contract clause, Article I, Section 10 of the United States Constitution and the due process and equal protection clauses of the United States Constitution and Section 10(b) of the Securities and Exchange Act and the rulings promulgated thereunder.

In addition the complaint challenged the constitutionality of P.L. 94-236, which law continued the tax exempt status of the five city retirement systems participating in the Amended and Restated Agreement dated November 26, 1975.

On November 30, 1978, the Court of Appeals for the Second Circuit (one judge dissenting), in reversing in part the order of the District Court, held that the plaintiff, as a beneficiary of a public pension fund, has standing on behalf of the fund to bring an action under §17(a) of the Securities Act of 1933 and §10(b) of the Securities Exchange Act of 1934. The Court upheld the District Court's dismissal of the causes of action relating to the contracts clause, the due process and the equal protection clauses and P.L. 94-236.

On January 4, 1979, the municipal appellees filed with the Court of Appeals a petition for rehearing with a suggestion for rehearing en banc. During the Court of Appeals review of the petition for rehearing, this Court decided International Brotherhood of Teamsters v. Daniel, 47 U.S.L.W. 4735 (Janaury 16, 1975). The Court of Appeals has not made a determination with respect to the petition for rehearing.

QUESTIONS PRESENTED

1. Where the petitioner has continued to receive his full retirement allowance during the pendency of the litigation and he has not suffered any concrete injury with respect to his pension, does the petitioner have standing to challenge the constitutionality of P.L. 94-236 and the rulings issued by the IRS thereunder?

2. Does P.L. 94-236 deprive the petitioner of equal protection or due process of the laws?

FACTS

(1)

The plaintiff-pro se was employed as a teacher by the Board of Education of the City of New York until 1951 when he retired (B1).* During his employment he made monthly contributions from his salary to the Teachers Retirement System (TRS)(B3). Since his retirement, he has been receiving a retirement allowance of approximately $3000 a year from the Teachers Retirement Board (B3). The plaintiff age 69 had a

*Unless otherwise indicated references in parentheses preceded by a letter refer to the Appendices submitted by the petitioner in the Court of Appeals. References not preceded by a letter refer to the original papers.

life expectancy of 13 years (B3). The Board of the TRS consists of the President of the Board of Education, or an authorized representative designated by him, the City Comptroller, two persons appointed by the Mayor, one of whom shall be a member of the Board of Education, and three members of the retirement association elected by the contributors.

(2)

In June 1975, the New York State Legislature, in response to New York City's dire financial crisis, established the Municipal Assistance Corporation. McKinney's New York Public Auth. Law §3033(1). MAC was authorized, through a series of legislative enactments, to issue more than five billion dollars in notes and bonds. §3033(2).

On September 9, 1975, the New York State Legislature passed the New York State

Financial Emergency Act for the City of New York. L. 1975, Chapters 868-870. After setting forth a statement of findings demonstrating that New York City was in financial emergency, the Legislature created the New York State Emergency Control Board, a state agency which was given certain supervisory authority over the finances of New York City. L. 1975, Ch. 868, §2(7). The Act also required the Emegency Control Board to develop with city officials a three year plan which would help improve the city's financial condition. L. 1975, Ch. 868, §2(8).

As part of the financial plan, the Legislature authorized the pension funds and the retirement systems to purchase bonds of the Municipal Assistance Corporation in principal amounts as set forth in

the statute. L.1975, Ch. 868, §(2).* The Teachers Retirement System was authorized to purchase $275,000,000 in MAC bonds. The legislation also declared that MAC securities are reasonable, prudent and legal investments for the fund and that no trustee would incur any liability to any person beneficially interested in a pension or retirement fund by reason of an investment in MAC securities. Retirement & Social Security Law §179, L. 1975, Ch. 868, 6(2).

As a further part of the three year plan, the City Pension Funds (including the Teachers Retirement Fund and the New

*The legislation also "directed" the pension funds to purchase MAC bonds. To the extent the statute sought to compel the purchases it was held to violate Article V, Section 7 of the New York State Constitution. Sgaglione v. Levitt, 37 NY 2d 507, 337 N.E. 2d 592 (1975).

York City Sinking Funds) and eleven commercial banks entered into an agreement on November 26, 1975 whereby the Pension Funds, among other things, agreed to purchase specified amounts of New York City Serial bonds. The Teachers Retirement Fund (TRF) agreed to purchase $860 million of city bonds over a three year period (B5).

(2)

This action was commenced on February 16, 1977. The plaintiff, in his complaint, alleges that the Trustees of the Teachers' Retirement system have acted illegally in using TRS assets to purchase "poorly rated, illiquid, high risk New York City obligations" (B5). The complaint further alleges that these purchases of MAC and City securities have reduced the value of the retirement fund to the detriment of the

retirees and for the benefit of those currently employed (B5).

The complaint apparently alleges three separate claims for relief. In a cause of action based on 42 U.S.C. §1983, the plaintiff contends that the trustees' investments violated his rights as a beneficiary of the pension fund under Article I, Section 10 of the United States Constitution, and the due process and equal protection clauses (B9).

Plaintiff also contends that P.L. 94-236 is unconstitutional because it continues the tax exempt status of the five city retirement systems participating in the agreement (B5, 14).

The third cause of action alleges that the trustees, in their requests to the Internal Revenue Service for a ruling on the System in light of the November 26

Agreement, did not make full disclosures as required by Section 10(b) of the Securities Exchange Act of 1934.

The relief requested in the complaint includes an injunction enjoining the defendant trustees from further sales of Teachers Retirement System corporate assets to purchase New York City obligations, a declaration that P.L. 94-236 is unconstitutional; a settting aside of the revenue rulings by the Internal Revenue Service; and a determination that the November 26 Agreement is invalid (B16).

On March 4, 1977, the defendant trustees moved to dismiss the complaint on the grounds of failure to state a claim and lack of jurisdiction. On April 8, 1977, the Federal defendants moved to dismiss on the same grounds.

On May 9, 1977, the plaintiff moved for a preliminary injunction. In his supporting affidavit, Mr. Kirscher stated that the trustees' purchases of New York City and MAC bonds have harmed his vested interest in the Retirement System, which he values at $39,000 (Kirshner, Affid, p. 1). Mr. Kirschner also stated that the purchase of $860 million dollars of New York City bonds would require the sale of hundreds of millions of sound corporate securities "inflicting irreparable injury of more than $100 million on the pensioner minority of TRS which owned 87% of the funded assets" (id. at p. 4).

OPINIONS BELOW

District Court Opinion

In denying the motion for a preliminary injunction and dismissing the

complaint, the District Court discussed at length each of the causes of action asserted by the plaintiff. The Court noted that each of the issues raised in the instant case had been rejected in other cases, citing in particular Sgaglione v. Levitt, 37 NY 2d 507, 337 N.E. 2d 592 (1975) and, Withers v. Teachers Retirement System, 765 Civ. 4474 (S.D.N.Y., Dec. 22, 1976) affd. ___F. 2d____, Dkt. No. 78-6059, opinion dated January 16, 1979.

With respect to petitioner's claim that P.L. 94-236 is unconstitutional, the Court noted that the petitioner, to have standing, was required to be aggrieved by the application of the statute or the agency's action pursuant to the enabling legislation (Appendix B, attached to petition for certiorari at p. 23a). It found that the "unadorned speculation" that

the petitioner might suffer financial loss did not permit him to attack the IRS decision to continue the tax exempt status of the funds (p. 23a). The Court noted that the challenged action must directly violate the petitioner's rights (p. 23a).

In reviewing the merits of the legal issues, the Court rejected the due process argument noting that the petitioner does not have a vested property right in controlling the investment decisions of the trustees (24a). With respect to the equal protection clause, the Court found the P.L. 94 236 had a reasonable relationship to legislative goal; the fiscal preservation of the City of New York (25a).

Court of Appeals Opinion

In rejecting the petitioner's claim that P.L. 94-236 and the IRS ruling issued pursuant to the statute that the contemplated transactions would not constitute prohibited transactions, are unconstitutional, the Court* found that the petitioner had not shown that he or the fund were harmed by the statute or IRS ruling (Appendix A to petition for Certiorari at p. 10a). The Court noted that the protection of the fiscal integrity of the City of New York is a valid state goal and not in contravention of Article I, Section 10 of the Constitution (11a). The Court further noted that the governmental

*One Judge dissented with respect to the holding that the petitioner has standing to sue under §10b(5), The judge agreed with the majority in that portion of the opinion upholding the constitutionality of P.L. 94-236 (id, at pp. 15a-16a).

objective of protecting the fiscal integrity of the City by removing any question of the tax exempt status also compels a rejection of the claims relating to due process and equal protection (id at pp. 11a-12a).

ARGUMENT

THE PETITIONER, WHOSE RETIREMENT PAYMENTS BEGAN IN 1953, AND EACH OF THE MEMBERS OF THE PETITIONER'S CLASS HAVE CONTINUED TO RECEIVE THEIR RETIREMENT ALLOWANCES. PETITIONER HAS NOT SUFFERED ANY INJURY FROM P.L. 94-236 AND THEREFORE DOES NOT HAVE STANDING TO CHALLENGE ITS CONSTITUTIONALITY.

ASSUMING, ARGUENDO, THAT PETITIONER HAS STANDING TO SUE, P.L. 94-236 AND THE IRS RULING ISSUED THEREUNDER ARE CONSTITUTIONAL.

(1)

It is petitioner's burden, as required by Article III of the United States Constitution, to establish a concrete and reviewable controversy between himself and the

Federal Government with respect to P.L. 94-236 and the IRS ruling issued pursuant to the statute. To satisfy his burden, the petitioner must show an injury to himself that is likely to be redressed by a favorable decision. Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 498-499 (1975). The petitioner must show "some threatened or actual injury resulting from the putatively illegal action." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). See also, Data Processing Service v. Camp, 397 U.S. 150, 151-154 (1970). Speculation concerning a potential injury to the plaintiff is not sufficient to establilsh standing to sue. Simon v. Eastern Ky. v. Welfare Rights Organization, supra, 426 U.S. at p. 44.

Applying the principles set forth above, the petitioner in the instant case does not have standing to challenge the constitutionality of P.L. 94-236. The petitioner has not suffered any injury as a result of P.L. 94-236. When the petitioner retired in 1951, he was entitled to a retirement allowance of $3000 a year. He has received every payment to which he is entitled and is currently receiving his retirement allowance. In addition every member of the purported class in the instant case is receiving the entire retirement allowance to which he is entitled.

The absence of a sufficient injury to permit the petitioner to sue is emphasized by the issue sought to the reviewed by this Court which involves a challenge to a statute passed by Congress. It is the New York City Teachers Retirement System,

not Congress which, in the exercise of its discretion, invested in MAC bonds and New York City securities. The statute P.L. 94-236 does not require any action by the Teachers Retirement System. It provides that if the Trustees, in their discretion, undertake a specified investment, the pension fund will not lose the tax exemption benefits of §401 et seq. of the Internal Revenue Code.

The trustees, even without the IRS ruling and legislation could have committed themselves to the purchase of the New York City securities. The source of the commitment is the Agreement, dated November 26, 1975, between the banks and the New York City pension and sinking funds.

It is noteworthy that if the petitioner was successful in his challenge

to P.L. 94-236, the remedy, the declaration of unconstitutionality of the statute would not redress the injury he contends he may suffer. If P.L. 94-236 were declared to be unconstitutional, the tax exempt status of the pension fund would be revoked. The result would be to place the Pension Fund in a much weaker position than it is now. Since the petitioner cannot benefit by the declaration of unconstitutionality, that, by itself, indicates that he has not suffered a sufficient injury to have standing to sue on this issue. See Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at p. 40.

(2)

Assuming, arguendo, that petitioner has standing to sue, P.L. 94-236 does not

violate the due process and equal protection clauses of the United States Constitution. With respect to the due process and equal protection questions, on either issue the appropriate standard for an economic matter is the rational relationship test. If the challenged actions are rationally related to a lawful governmental objective, the actions will not violate the equal protection and due process clauses. See San Antonio Ind. School District v. Rodriguez, 411 U.S. 1,17 (1973).

P.L. 94-236 and the rulings issued thereunder relate to the management of the Retirement System's assets. The Retirement System's purchase of the specified amounts of City related notes and bonds was part of a complicated plan,

which included the New York City Seasonal Financing Act of 1975, authorizing the Secretary of Treasury to loan up to §2.3 billion at any one time to the City of New York, to enable the City to avoid bankruptcy. P.L. 94-236 permitted the various City pension and sinking funds to purchase the bonds without the loss of tax exempt status. The loss of the tax exempt status would have required the Funds to pay an immediate tax on current assets and contributions to the plans (Report of House Ways and Means Committee dated February 23, 1976, at p. 4). The possibility of this huge tax could have discouraged the pension plans from participating in the November 26, agreement and, without their participation, the entire financial plan could have been destroyed. The fiscal integrity of the City constitutes a valid state purpose and

bears a rational rationship to the challenged legislation, P.L. 94-236.

The implicit suggestion in the petition for certiorari and the amicus brief submitted by the National Education Association on behalf of the petitioner is that, even if the City of New York defaulted on its obligations and went into bankruptcy, the strength of Retirement System would remain undiminished.

This assumption is not justified. A default by the City would have an adverse effect on the Teachers Retirement System. All members of the system would have been affected. These points are emphasized repeatedly in the February 23, 1976 report of the Committee on Ways and Means, House of Representatives on H.R. 11,700 a bill which permits the trustees of the

various New York City pension funds to invest in New York City Serial Bonds without losing the System's tax exempt status.

The purchase of the New York City Serial Bonds by the pension funds was a key part of the plan to avert default (Report, pp. 14, 22). In his testimony before the Committee, Jack Bigel, pension consultant to the Munciiapl Labor Committee, testified that, in the event of the City's bankruptcy, the Pension Funds would be able to meet their obligations primarily to the retired members for a period not in excess of 6 to 8 years (Report, pp. 30, 32-33), Bernard Goldberg, a trustee of the New York City Teachers Retirement System, also testified that the Pension Funds' purchases of New York City obligations protected the interests of the present and future benefi-

ciaries of the retirement system (Report, p. 42).

The portion of the House Ways and Means Report which indicates that the the present fund, without further contributions, would be exhausted in eight to ten years assumes that all of the fund would be paid to retired members. This assumption is not justified. Article V, Section 7 of the New York State Constitution (impairment clause) also protects the rights of those people who have contributed to the fund but who have not yet retired. If the City was compelled to declare bankruptcy, some provision would have to be made for the members who have not yet retired. As a consequence, the fund would not be able to pay the retired members even for the short eight year period. The investments by the trustees challenged here

enable the Funds to protect the investments by the active employees to assure that the retired members will be able to receive the entire pensions to which they are entitled.

It should be noted that this goal has been fulfilled. As we noted above, each retired member of the fund has continued to receive his retirement allowance. At the same time, the City's financial health has improved and with it the Funds abililty to protect the rights of the employees who have contributed to the fund but who have not yet retired.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 2, 1979.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
of the City of New York,
Attorney for Respondents
Trustees of Teachers
Retirement System.

LEONARD KOERNER,
JUDITH LEVITT,

of Counsel.

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No. 78-1403

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALFRED KIRSHNER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below holding that he has no standing to challenge the constitutionality of federal income tax statutes and rulings addressed to the federal assistance to the City of New York during its recent financial difficulties, and that the statutes and rulings do not violate petitioner's right to due process and equal protection.

The pertinent facts are undisputed and may be summarized as follows: Petitioner is a pensioner of the Teachers Retirement System of the City of New York. He brought this action against the United States and the Trustees of the Teachers Retirement System in the United States District Court for the Southern District of New York attacking the purchase by the Teachers Retirement System of bonds issued by the City of New York and the Municipal Assistance Corporation

for the City of New York (MAC). MAC was created by the New York State legislature to assist New York City in obtaining financing during its recent financial difficulties. The core of petitioner's complaint is that the purchase of these bonds by the Teachers Retirement System was an extremely unfavorable investment that was made to help New York City and favored the interests of currently employed teachers to the detriment of the Teachers Retirement System and its members.

Petitioner further claimed that the Teachers Retirement System was encouraged to purchase New York City and MAC bonds as a result of an Internal Revenue Service ruling holding that such investments would not constitute "prohibited transactions" under Section 503(b) of the Internal Revenue Code of 1954 (26 U.S.C.), and that they would not jeopardize the tax-exempt status of the Teachers Retirement System under Section 401(a) of the Code. In the Act of March 19, 1976, Pub. L. No. 94-236, 90 Stat. 238, Congress made essentially the same determination for acquisitions of City or MAC bonds occurring after August 20, 1975, by the Teachers Retirement System and the other New York City pension plans. Petitioner sought a declaration that Pub. L. No. 94-236 is unconstitutional, an injunction preventing the application of this statute, and an order setting aside the Internal Revenue Service's ruling (Pet. App. A 9a).

The district court held that petitioner had no standing to challenge the tax statutes or the Internal Revenue Service ruling and further rejected his claim on the merits (Pet. App. B 19a-25a). The court of appeals agreed that petitioner had no standing to sue the federal respondents, and that his constitutional

claims against the federal respondents were without merit (Pet. App. A 1a-15a).[1]

1. The court of appeals correctly held that petitioner had no standing to sue the federal respondents in order to challenge the constitutionality of federal tax statutes and their enforcement. As the court observed, petitioner has not shown that he sustained the requisite "actual injury" as a result of the actions of the federal respondents. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976). The sole interest petitioner has in the Teachers Retirement System is the contractual right to receive pension benefits (Pet. App. A 3a). But petitioner does not allege that he failed to receive his pension benefits (Pet. App. A 3a). Whether there will be any such failure in the future is completely speculative (see Pet. App. A 16a). Petitioner has merely alleged that the challenged investments may not generate as much income as other available investments. However, he has failed to establish or even allege facts showing that his pension will not be paid at any specific time. Accord: *Withers* v. *Teachers Retirement System of the City of New York*, No. 78-6059 (2d Cir. Jan. 16, 1979).

Petitioner's standing to challenge the Teachers Retirement System's federal tax exemption is further defective because there is no substantial likelihood that the requested relief would redress his claimed injuries. *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 43-46. See also *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-77 (1978). The relief sought from the federal

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[1]The court of appeals further held that petitioner did state a cause of action against the Teachers Retirement System under the federal securities laws (Pet. App. A 12a-15a). However, that claim is not before the Court at this time.

respondents—a declaration that Pub. L. No. 94-236 is unconstitutional, an injunction against its application, and an order setting aside similar rulings by the Internal Revenue Service—cannot redress the injury to the Teachers Retirement System's financial integrity that petitioner claims to have resulted from its purchase of City and MAC bonds. The only consequence of the award of such relief would be the loss of tax-exempt status under Section 401 of the Code, a result that could only injure the Teachers Retirement System and possibly jeopardize petitioner's pension. Moreover, the loss of tax-exempt status by the Teachers Retirement System might not even accomplish the cessation of its purchase of New York City and MAC bonds that petitioner seeks, for the Teachers Retirement System might choose to continue investing in such bonds despite the loss of its tax exemption.

Petitioner (Pet. 10-12) and the *amicus* National Education Association/New York City (Br. 21 n.*) contend that if the tax statute and the Internal Revenue Service ruling were set aside, the purchase of the City and MAC bonds could be rescinded. But neither the City of New York nor MAC is a party in this litigation. Moreover, neither the federal statute nor the rulings required the investments of which petitioner complains. If the Teachers Retirement System's investments are shown to have been wrongful, the district court's power to grant a remedy on remand as to the non-federal defendants would be the same whether or not petitioner obtains the relief he seeks against the federal respondents. The decision below therefore correctly dismissed the suit against the federal respondents.

2. Even assuming that petitioner has standing to sue the federal respondents, the courts below correctly held that his due process and equal protection claims are

without merit. Petitioner's case seems to be founded on the premise that the federal government's special tax treatment of the five New York City pension funds constituted an unconstitutional classification and discrimination. But "[n]ormally, a legislative classification [respecting tax exemption] will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970). The challenged federal actions satisfy this test because they are part of an integrated federal-state program that successfully saved New York City from bankruptcy.[2] Especially in such circumstances, "[t]he latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

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[2]In the debates on H.R. 11700, 94th Cong., 2nd Sess. (1976), which became Pub. L. No. 94-236, Senator Long, Chairman of the Senate Finance Committee, stated: "In other words, if this legislation is not passed, New York City will be immediately plunged into a financial crisis which we have already sought to forestall." 122 Cong. Rec. S2796 (daily ed. Mar. 4, 1976). See also the legislative findings with respect to New York City's need for financing at Section 2, New York City Seasonal Financing Act of 1975, Pub. L. No. 94-143, 89 Stat. 797 (31 U.S.C. 1501).

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In The

Supreme Court of the United States

October Term, 1978

No. 78-1403

ALFRED KIRSHNER,

Petitioner,

-v-

UNITED STATES OF AMERICA, SECRETARY OF THE TREASURY, COMMISSIONER OF I.R.S., ALVIN D. LURIE, in his capacity as Assistant Commissioner Employer Plans and Exempt Organizations, I.R.S., BERNARD GOLDBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, HARRISON GOLDIN, JAMES REGAN, Individually as Trustees of the Teachers Retirement System of the City of New York and ISAIAH ROBINSON,

Respondents.

BRIEF AMICUS CURIAE SUBMITTED BY NATIONAL EDUCATION ASSOCIATION/NEW YORK CITY IN SUPPORT OF PETITION FOR CERTIORARI

VICTOR RABINOWITZ
Attorney for National Education Association/ New York City, Amicus Curiae
30 East 42nd Street
New York, New York 10017
(212) 697-8640

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ALFRED KIRSHNER,

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UNITED STATES OF AMERICA, SECRETARY OF THE TREASURY, COMMISSIONER OF I.R.S., ALVIN D. LURIE, in his capacity as Assistant Commissioner Employer Plans and Exempt Organizations, I.R.S., BERNARD GOLDBERG, REUBEN MITCHELL, JOSEPH SHANNON, ROBERT CHRISTEN, HARRISON GOLDIN, JAMES REGAN, Individually as Trustees of the Teachers Retirement System of the City of New York and ISAIAH ROBINSON,

Respondents.

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BRIEF AMICUS CURIAE SUBMITTED BY NATIONAL EDUCATION ASSOCIATION/NEW YORK CITY IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS

The National Education Association/ New York City is an affiliate of the National Education Association, an organization of 1,800,000 members employed as teachers and paraprofessionals in the education field. The amicus is vitally interested in all issues affecting the teaching profession. The questions raised by this case concern the security of the Teachers Retirement System of New York City in particular, and the safety of all public employee retirement systems in general. The members of approximately 30% of all government plans are school teachers.

That petitioner herein has proceeded pro se in an extraordinarily complex and difficult case, makes the submission of an amicus brief prepared by counsel most desirable, if not necessary, to frame and present the issues and facts more satisfactorily than he has been able to do. In particular, there is considerable matter on the public record and the record of this case which should be called to the Court's attention regarding the operation of the New York City Pension Funds during the City fiscal crisis. The resolution of the difficult question regarding the use of pension

fund assets by an employer, in this case New York City, in times of financial stress and the standing of a pensioner to raise these issues will affect intimately each one of our members. We believe our brief will assist* the Court in resolving those questions.

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*Letters of consent by petitioner pro se and the Solicitor General of the United States for respondents to the filing of this brief have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

The Teachers Retirement System of the City of New York ("TRS") is a pension trust funded in part by the compulsory contributions of New York City Board of Education teachers and in part by contributions of the City of New York ("the City"). In 1974, there were approximately 25,000 retired and 80,000 employed members of the System. The petitioner, a high school science teacher who was retired as disabled in 1953, received a pension of approximately $3,000 a year and, at age 69 when the proceeding was commenced, was entitled to a lifetime pension, the actuarial value of which was $39,000.

Upon the retirement of a TRS member, amounts deemed sufficient to fund the member's lifetime pension are transferred on the books of TRS to its annuity reserve and pension reserve funds. Of the $1.85 billion of assets* on hand as of June 30, 1974, 87% - 1.62 billion dollars - had been so transferred to fund pension payments to members who had already retired. Total accrued liabilities of TRS were $4.62 billion.

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* Unless the contrary appears from the context, the values set forth herein are par values.

The poor - one might say critical - condition of TRS in 1974 was self-evident. Although the pensions of the retirees were considered to be fully funded, very little - but $0.23 billion - was available to meet all other liabilities. And, should there be significant losses in the value of the securities funding the retirees' pensions, there were few assets available to replenish those funds. The New York State Permanent Commission on Public and Employee Pension and Retirement Systems concluded in March, 1975 that not only was the ratio of assets to liabilities of active members an "unbelievabl[y]" low 9% in TRS, but also that soon "the assets will be insufficient to cover the pension reserve for retirees . . . ."* Further, since the actuarial assumptions used by the TRS were highly inaccurate and archaic, it is probable that, even in 1974, the pensions of the retirees were seriously underfunded.**

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* New York State Commission on Public and Employee Pensions and Retirement Systems, Financing the Public Pension Systems 37 (New York: Permanent Commission, March, 1975) ["the Kinzel Report"]

** Kinzel Report at 12-13. See, in general, Securities and Exchange Commission Staff, Report on Transactions in Securities of the City of New York, Chapter 2 at 49-61 (Washington: Gov't. Print. Of. 1977) ["SEC Staff Report"].

One would have thought that under such circumstances the Trustees and the City would have taken steps to improve the solvency of the TRS. In the event, the opposite happened.

During the period of October, 1974 through March, 1975, New York City's increasing fiscal problems forced it to issue over $4 billion in short-term notes. Rather than improving its financial status, such issue led to a complete foreclosure from the public capital markets by March, 1975.* Although once the source of significant loans and still holding some amounts of City notes, the New York City commercial banks were unwilling to extend any further credit to the City and refused to buy or try to market City notes after April 4, 1975.**

Closed out from public capital markets, the State and City government sought new sources for raising money. In June, 1975 the State created a Municipal Assistance Corporation for the City of

*Securities and Exchange Commission, Final Report in the Matter of Transactions in Securities of the City of New York, Securities Act of 1933 release no. 6021 (Feb. 5, 1979) at 1.

** The banks had begun selling their own investments in City obligations as early as September, 1974 and had avoided purchase of City securities for their own and fiduciary accounts. SEC Staff Report, supra, Chapter 4 at 31. Nonetheless, the holdings of the banks exceeded $1 billion in March, 1975. Id., at 3.

New York ("MAC") which, through the sale of bonds, could provide the City with funds needed to pay maturing City notes.

But the sale of MAC bonds did not generate funds sufficient to meet the City's needs. The State and Federal governments were also insufficiently responsive to the requirements of the City and other sources of funds were not immediately visible - except for several billions of dollars in the five city pension trusts.* True, those funds were held by the Trustees for the benefit of city employees both retired and active, and not for the benefit of City bond-holders. Outright seizure of the funds was clearly impossible, both legally and politically.

* "In a very real sense, the City's pension plans became the last repository of any sizeable amount of funds for the City to draw upon during its fiscal crisis. The City's continued access to public markets was in jeopardy, the large financial institutions were threatening to withdraw further support of the City, and the City's cash needs were escalating. Faced with these crises, the City turned to its last source of funds, the pension funds, which were freely utilized in an attempt to shore up the City's finances." SEC Staff Report, supra, Chapter 3 at 95.

With a cynicism seldom surpassed in municipal financing, the City and banks nevertheless turned to the pension trusts and, by a series of legal steps, some of which are the subject of this lawsuit, were able to divert those funds to meet the City's indebtedness.* The result was to strip the TRS of still more of its assets and to reduce the assets held to fund the pensions for retired employees to the point where the obligation was not funded at all, in violation of §B20-27.0 of the Administrative Code of the City of New York. As a result of the scheme developed in the next few months, the TRS, which had, in 1974, held only $110,000,000 in City obligations,** increased its holdings in public, tax-exempt securities to close to a billion dollars.

TRS purchased $275 million of first resolution issue 11% MAC bonds by September, 1975. However, the total raised by MAC was not sufficient for the City's needs and the security of MAC bonds themselves was doubted

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* We do not discuss the moral implications of the actions of the defendants, although we are loath to believe that the Court will consider them totally irrelevant.

** The System's 57th Annual Report, Fiscal Year, 1973-74, at 25.

by investors. On November 14, 1975 a Moratorium on actions to enforce the City's short-term obligations was enacted by the New York State Legislature.* On November 15th the City defaulted on its outstanding notes maturing that day.**

The City and the commercial banks once again moved against the funds held in the pension trusts.*** These trusts were uniquely susceptible to pressure: the Trustees of the TRS were City and Board of Education officials, mayoral appointees, and three persons elected by active teachers, all of whom were members of the Teachers Union which was engaged in collective bargaining with the Board of Education. The retired pensioners were "aged, widely scattered, unorganized, politically powerless, without representation and voiceless [in the management of

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* N. Y. Laws 1975, Chapters 874, as amended by Chapter 875 (McKinneys, 1975).

** See Flushing National Bank v. Municipal Assistance Corporation, 40 N.Y.2d 731, 747-748 (1976) (dissent) for a summary of legislative and executive actions undertaken during the period.

*** The banks held significant amounts of City notes which, by virtue of the Moratorium, had lost at least 50% of their market value and could not be redeemed for at least three years.

TRS]."* Funds to finance complex lawsuits in self-defense were not available. If we may be permitted to mix metaphors, TRS was a sitting duck about to be plucked.

On November 26, 1975, only eleven days after the City had defaulted on its obligations, an agreement (the "Agreement") was reached among the major New York City commercial banks, five New York City Pension Funds, the NYC Sinking Funds and MAC, by which the Pension Funds agreed to purchase $2.5 billion of City bonds.** For its part, TRS agreed to purchase $860 million of City bonds before June 30, 1978 which would be paid for primarily through the sale of its current assets. TRS also agreed to exchange high interest (11%) MAC bonds for other MAC bonds bearing only 6% interest. The purchases were agreed to by the Pension Funds even though the major rating agencies had either completely suspended their rating of City bonds or downgraded them to their lowest category (6a). The 6% MAC bonds, rated by Moody's at B (6a), were considered highly risky and insufficiently secured.

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* Affidavit for preliminary injunction of petitioner, sworn to March 17, 1977.

**Agreement is set out at 121 Cong. Rec. S.21,308-S.21,310 (daily ed. Dec. 5,1975).

The "Agreement" was contingent, however, upon the fulfillment of certain conconditions including, inter alia, that

> the Internal Revenue Service shall have ruled or the Congress of the United States shall have provided, that such purchases of obligations by the Pension Funds pursuant to this Agreement shall not constitute prohibited transactions or otherwise adversely affect the qualified status of the Pension Fund for the purposes of the Internal Revenue Code of 1954, as amended.

Under the Internal Revenue Code, a pension plan loses its tax exempt qualified status if it fails to conform to the provisions of 26 U.S.C. 401(a) and §503(b). Additionally, pursuant to IRS rulings, assets may not be diverted to the benefit of the employer, in this case, the City, unless certain conditions are met. All parties to the Agreement were aware that the purchases agreed to by the System were, as of the date of the Agreement, unlawful and improper as not in conformity with the applicable statutes and regulations.*

Furthermore, the Agreement was contingent upon the enactment of federal

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* See Rev. Rul. 69-494, 1969-2 Cum. Bull. 88. (fn continued)

"Seasonal" loan legislation by the Congress.** The plan to provide New York City with funds, the source of which was to be the Pension Plans, was complete.

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* (fn continued) The House Committee on Educational and Labor concluded:

> "Inasmuch as the agreement to purchase the city securities was itself contingent on (1) exemption of the purchases from the Internal Revenue Code prohibited transaction and exclusive benefit rules, and (2) passage by the New York legislature of a bill indemnifying the plan trustees against liability for making such purchases, it was implicity recognized by all the parties to the agreement that governmental plan assets were to be used for some purpose other than generating income to the fund or defraying reasonable administrative expenses."
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> House Com. on Education and Labor, Pension Task Force Report on Public Employee Retirement System, 95th Cong., 2d Sess. (Comm. Print, March 15, 1978) at 194 ["PERS Report"].

** Agreement at ¶¶ 6, 7(e)(vii). That legislation was signed by the President on December 9, 1975, the New York City Seasonal Financing Act of 1975, P.L. 94-143, 89 Stat. 797 (1975).

Legislative leaders and the President implicitly agreed to pass legislation to permit the agreement to go forward.* Because even more capital than the $2.5 billion was needed, the federal government agreed to provide the rest through the loan program.

When the agreement was made, New York City securities were selling far below their par value. On November 5, 1975, before the enactment of the Moratorium, city notes were traded at 35% below par value. After the Moratorium, the market value of City securities had dropped almost 50%. Thus, when TRS and other pension funds agreed to purchase more City bonds at par value on November 26, 1975, they knew that the real value of their holdings would be substantially reduced. The risk of further City default on all its obligations was extremely high.

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* Charles M. Walker, Assistant Secretary of the Treasury for Tax Policy, testified in House hearings on H.R. 11700 [P.L. 94-236] that the federal financing guarantees was enacted by Congress with the understanding that the Agreement would be implemented. Hearings on H.R. 11700 before the House Committee on Ways and Means, 94th Cong. 2d Sess. at 3 (1976). The Agreement, for its part, was dependent upon the enactment of legislation. A quid pro quo had been set.

Petitioner's and all pensioners' benefits were no longer guaranteed since their pensions no longer were fully funded.*

In December, 1975 the TRS sought approval for the purchase of $182 million in City bonds which was granted by IRS in letters from Assistant Treasury Commissioner Lurie dated December 5th and 13th, 1975. TRS sold $212 million of "sound, varied and highly-rated corporate bonds" at a loss of $30 million and purchased the $182 million of low grade, NYC securities, at par, a price 20% above market value (7a). On February 1, 1976, pursuant to the Agreement,

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* Because of the course of purchases and sales undertaken by the respondents, approximately 45% of the TRS portfolio now is City and MAC securities. Petitioner alleged that $204 million was lost in premature and imprudent sales of high quality bonds to purchase the securities. Petition for certiorari at 7. The $1.62 billion in assets pledged to the pensions, a valuation based on par and book value, not market value, does not now guarantee future payment of petitioner's pension (if it ever did - see supra, p.3) because the real value of assets is much lower. A witness at Congressional hearings had stated that the assets of the City pension funds actually were worth at market only 65% of their stated value in December, 1975. House Report No. 632 - Part I, "Minority Views on H.R. 10481," 94th Cong., 1st Sess., 1975 U.S. Code Cong. Adm. News 1549.

TRS exchanged the 11% MAC bonds, in the principal amount of $215 million, for others bearing 6% interest.

Had approval been denied or any of the other conditions not been met, TRS might have been obliged to purchase only $170 million of MAC bonds but only if the President of the United States had announced publicly his support for federal financing legislation for the City.* No other purchases were required by the Agreement if IRS approval was withheld or no legislation excluding the pension funds from the safeguards of § 401 (a) was enacted. Indeed, further purchases would have been in violation of §§ 401 and 503.

At hearings before the House Committee on Ways and Means, the Treasury Department enunciated its support of H.R. 11700 [P.L. 94-236], concluding that the purchases in the Agreement otherwise would be unlawful.** The passage of P.L. 94-236, 90 Stat. 238 (1976), approved March 19, 1976 was the final precondition to the complete fulfillment of the Agreement. P.L. 94-236 provided that, of the 600,000 employee pension plans in the nation, only the five New York City pension funds which were

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* Agreement, ¶ 7(f). $170 million was TRS's proportionate share of $500 million, as set forth in Schedule D of the Agreement.

** Testimony of Charles M. Walker, supra.

parties to the Agreement were exempted from compliance with 26 U.S.C. §§ 401(a) and 503(b) with respect to their dealings with the City, MAC and New York State. As a direct result, TRS continued its purchases of City and MAC obligations. Approximately 50% of the System's assets were destined to be New York City and MAC notes and bonds by June 30, 1978.*

The impact of these purchases of City and MAC obligations on the security of petitioner's pension was substantial. The real value of the System's portfolio, concentrated in illiquid, unsaleable City and MAC securities, dropped precipitously, not only because of the character of the securities purchased, but because their purchase was made possible only by the sale of sound securities at a loss.

ARGUMENT

The court below affirmed the dismissal of the action against the federal defendants because it reads the December IRS rulings and P.L. 94-236 as enactments designed to protect the tax-exempt status of pension trusts while they engaged in conduct which was, but for 26 U.S.C. §§ 401(a) and 503(b), legal and proper.

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* About $1.2 billion of TRS's assets (valued at par or book value) were City and MAC securities by November 1978. TRS Monthly Report, Nov. 30, 1978.

If such were the purpose and effect of the statute, the court's conclusion that the statute caused no harm to the petitioner (10a) and benefitted, rather than damaged the City and its creditors (12a), might have been sound, but the court misunderstood petitioner's argument and the nature of the transaction of which he complains.

Here the petitioner complains, not that the TRS was permitted to keep its tax-exempt status and still buy City bonds; he complains rather that TRS was permitted to buy City bonds under the circumstances described above. It was the purchase of the bonds, made possible by the passage of P.L. 94-236 - amounting to a de facto seizure of the funds of TRS by the City - which is the gravamen of his complaint. It is difficult to see how the petitioner did not suffer grievous harm as a result of that purchase.

It was the acquisition of City securities and the losses which attended those purchases that was the "injury in fact", Association of Data Processing Service Orgs., Inc. v. Camp. 397 U.S. 150, 152 (1970). Had IRS or P.L. 94-236 not removed that "question as to tax-exempt status" (12a), the purchase could not have occurred. But for the December IRS rulings and P.L. 94-236, petitioner would not have suffered injury.

The issue of petitioner's standing is

composed of several closely interrelated elements. The first is the constitutional issue over whether there is a "case or controversy" between plaintiff and defendant; the second is whether there is a casual connection between the actions complained of and an injury to petitioner; the third is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Service Orgs., Inc. v. Camp, supra at 153.

Accepting as true all material allegations of the complaint and construing it in favor of petitioner, Warth v. Seldin, 422 U.S. 490, 501 (1975), petitioner meets all of these tests. He has shown the necessary "personal stake and interest that impart the concrete adverseness required by Article III", Barlow v. Collins, 397 U.S. 159, 164 (1970). As a beneficiary of TRS, petitioner's interest in the safety of the trust's corpus is self-evident. "[S]eparating the legal and beneficial incidents of ownership of property is a mere technical argument since there is only one interest at stake and that is the beneficiary's." James v. Gerber Products Co., 483 F.2d 944 (6th Cir. 1973). Because the pension plan is no longer fully funded, as the intended recipient of the benefits petitioner has

suffered a threatened, if not actual, injury. Indeed, by recognizing his standing to assert claims against the trustees, the court below implicity acknowledged petitioner's personal stake in transactions involving the pension trust's corpus. The "distinct and palpable injury" to petitioner is apparent by the invasion of his rights under the trust agreement and applicable State and Federal law.

The casual connection between petitioner's injury and action complained of meets the "prudential limitations" requirement of the exercise of federal jurisdiction, Warth v. Seldin, supra at 501.

Petitioner's interest in TRS is within the zone of interests protected or regulated by 26 U.S.C. §§ 401(a) and 503(b). The IRS Code provisions were designed "[t]o insure diversification of the investment of funds

and to protect the interests of covered employees." House Report No. 1337, 83rd Cong., 2d Sess., 1954 U.S. Code Cong. & Adm. News 4017, 4071. See also McClintock-Turnkey Co. v. Commissioner of Internal Revenue, 217 F.2d 239 (9th Cir. 1954). Thus, petitioner's de facto exclusion from those prophylactic provisions entitled him to federal court review of its legality.

Petitioner's right to object to actions effectuating the diversion of TRS's assets is also provided by state law giving rise to still another source of standing. Members of a City pension system have a "contractual" right to their benefits which may not be impaired or diminished. N. Y. Const., Art. V, §7. This "contract" extends to the investment of the retirement funds themselves, as a retiree may object to a "radical change" which threatens the "integrity and security" of the investments. Sqaglione v. Levitt, 37 N.Y. 2d 507, 512 (1975).* Thus, by virtue

*Given the long-standing requirements of the IRS Code regarding prohibited employer transactions, the generally recognized need to avoid an imprudent concentration of securities in obligations of one or related debtors, and speculative nature of the City bonds, petitioner's attack on the purchases goes beyond simply an assessment of the "market worthiness" of the securities, which is left to the discretion of the trustees, Scaglione, supra, at 513. Although the securities are assertedly not proper investments, petitioner's (fn. cont.)

of state law, petitioner has a "property" interest in the integrity and security of the investments of the System, a state-created right subject to the protection of the Constitution. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Meachum v. Fano, 427 U.S. 215, 226-7 (1976).**

This case factually is far removed from Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) where it was "purely speculative" whether the Commissioner's

*(fn. continued)
claims are premised upon the invalidity of the entire legislative scheme. However, see contra, Withers v. Teachers' Retirement System of the City of New York, 447 F.Supp. 1248, 1260 (S.D.N.Y. 1978).

**In significant part, it is petitioner's contributions which were used to purchase securities and were entrusted to TRS for repayment to him upon retirement, cf., International Brotherhood of Teamsters v. Daniel, ___ U.S. ___, 47 U.S.L.W. 4135 (1979). Concluding that while not essential to its holding that a pensioner has a protected interest in the City pension funds, the New York Court of Appeals noted that this employee contribution was a "salient fact" to be considered. Sqaglione, supra at 512.

ruling had the effect of denying the petitioners' hospital services. Id. at 42-43. Here, federal government officials testifying before the Congress and members of Congress itself have conceded that the complained-of purchases were made only because the rulings were made and legislation enacted. "But for" the federal defendants' acts, petitioner would not have suffered the injury he did.*

The court below mistakenly concluded that since the maintenance of New York City financing is a legitimate government interest, any statute arguably

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*That the injury can be redressed by the exercise of the court's power, Simon v. Eastern Kentucky Welfare Rights Org., supra at 43, is clear. Declaring that the purchases would not be proper would cause the annulment of the Agreement. Through application of the court's equitable powers, the City securities illegally purchased could be sold over a period of time and TRS restored approximately to the condition it was in before November, 1975. See, e.g., Flushing National Bank v. Municipal Assistance Corp., 40 N.Y.2d 1094 (1977), where a gradual redemption plan for City notes was developed by the New York Court of Appeals following its holding that the Moratorium was unlawful.

having that goal would be proper. However, when a statutory classification has the effect of singling out particular individuals to bear the cost of advancing the public convenience, that imposition must bear a reasonable relation to the advantage to be secured. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429-430 (1935). The statute here, P.L.94-236, which ratified the IRS rulings, discarded those protections provided petitioner and the other beneficiaries of TRS. No alternative standards or protection were imposed. The result was the dilution and diversion of assets, assets purchased with money contributed by the teachers themselves. That result is unreasonable and constitutes an uncompensated taking.

All the fiduciary safeguards at common law and those codified by state and federal statute mean nothing if, as here, they can be jetisoned at will. Ironically, the words of the minority in House Report No. 632 - Part 1 on the New York City Seasonal Financing Act of 1975 were prophetic:

> "We are aware of the New York State Court of Appeals decision that a trustee cannot be mandated to invest the funds under his control in Big Mac bonds.

> We are also aware of the law limiting the percentage of investment that may be invested in any one asset by a trustee. We likewise are aware of the Prudent Man Rule governing the proper investment conduct of trustees. And we are aware that short of bankruptcy, you cannot change the vested contract rights of beneficiaries of retirement and pension systems.
>
> But strange things happen to established rules and laws when bankruptcy stares a State or municipality in the face if they do not make full use of billions of dollars of assets that have been used and are being siphoned out of the State's and City's income streams."
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> 1975 U.S. Code Cong. Adm. News at 1549 (94th Cong., 1st Sess.) [emphasis supplied]

It is these "strange things" that have happened here that concern your amicus. The poor, aged and largely unrepresented and unheard pensioners at best

have been ignored, at worst preyed on by those making political decisions regarding City financing. Their property interest has been diminished without compensation.

CONCLUSION

We have set forth above, in some detail, the circumstances out of which this litigation arose. We conclude this brief by calling to the Court's attention some of the recent history with respect to efforts by the government to protect pension plans.

Prior to 1974, it was generally recognized that the ever-increasing number of pensioners in the United States were inadequately protected by existing law. The result was the enactment of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 (ERISA), which set up an elaborate system of rules designed to protect pensioners and members of pension trusts. State and city pension funds were expressly exempt from ERISA (29 U.S.C. § 1003 (b)(1)) because Congress wanted information "regarding whether a need exists for further regulation of governmental plans." PERS Report, supra, at 1. The word "further" can only refer to federal and state

regulations governing the conduct of such plans. The most important of those regulations were §§ 401(a) and 503(b) of Title 26. What P.L.94-236 did and was intended to do, was to remove even the protection of those statutes from the beneficiaries of the five New York City retirement plans, leaving petitioner outside the protection of either ERISA or the relevant federal statute.

We urge that the petition for certiorari be granted.

Respectfully submitted,

VICTOR RABINOWITZ, Esq.
Attorney for National
Education Association/New
York City, Amicus Curiae
30 East 42nd Street
New York, New York
(212) 697-8640

On the brief:
GORDON J. JOHNSON, Esq.

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